Supreme Court of the United States

OCTOBER TERM, 1965

No. 860

UNITED STATES, APPELLANT

vs.

ANTHONY L. FABRIZIO

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 8694-C

THE UNITED STATES

vs.

ANTHONY L. FABRIZIO

Attorneys

For U.S.:

John T. Curtin

For Defendant:

A. William De Fillippo

Transporting in interstate commerce papers to be used in wagering, in violation of Section 1953, Title 18, U.S.C.

CRIMINAL DOCKET

OFFENSE: 8/24/64 — 1 Count

STATISTICAL RECORD

J.S. 2 mailed Oct. 5 1964
J.S. 3 mailed
Violation
Title 18
Sec. 1853

COSTS

Clerk
Marshal
Docket fee

DOCKET ENTRIES

DATE		
1964		
Sept.	3	Filed indictment
	3	J.S. 2 made

DATE		
1964		
Sept.	8	Filed Commissioner's transcript and $500 cash bond—surety—Joseph P. Pirozzolo, 405 Holecek Ave., Elmira, N.Y.
	14	Defendant being duly arraigned enters a plea of not guilty
	16	Filed Court Stenographer's minutes of 9/14/64
	22	Filed Notice of Motion to Permit Inspection of Grand Jury Minutes and Supporting Papers, and Notice of Motion for Bill of Particulars and Supporting Papers, returnable at U.S. Court House, Rochester, N.Y., 9/30/64 at 10:00 a.m.
	28	File Government's bill of Particulars
Oct.	12	Filed Defendant's notice of motion to dismiss indictment, returnable at Rochester, N.Y., 10/13/64 at 10:00 a.m.
	13	Motion to dismiss indictment—adjourned 11/9/1964
Nov.	9	Motion by defendant to dismiss indictment—adjourned 12/14/64
Dec.	14	Motion by defendant to dismiss indictment—adjourned to 12/28/64
	28	Motion by defendant to dismiss indictment—adjourned to 1/11/65
1965		
May	17	Motion to dismiss indictment—submitted on papers
Oct.	6	Filed decision and order dismissing the indictment—BURKE, J.

[fol. 2]

Oct.	6	J.S. 3 made
Nov.	4	Filed Govt's. notice of appeal to the Supreme Court

Appeal

[fol. 3]

[File Endorsement Omitted]

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

May 1964 Term

No. 8694-C

THE UNITED STATES OF AMERICA

vs.

ANTHONY L. FABRIZIO

Vio. Title 18, U.S.C., Section 1953

INDICTMENT—Filed September 3, 1964

The Grand Jury charges:

That on or about the 24th day of August, 1964, ANTHONY L. FABRIZIO, knowingly did carry in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, in the Western District of New York, records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U.S.C.

/s/ John T. Curtin
United States Attorney

A TRUE BILL:

/s/ Donald H. Weeker
Deputy Foreman

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

No. 8694

[Title Omitted]

MOTION TO DISMISS INDICTMENT—Filed October 12, 1964

The Defendant moves that the indictment be dismissed on the following grounds:

1. That the indictment does not state facts sufficient to constitute an offense against the United States.

2. That the indictment and the Bill of Particulars which were served upon the attorneys for the Defendant herein do not set forth facts sufficient to charge the Defendant with the violation of U.S.C. Title 18, Section 1953.

3. That annexed hereto and made a part hereof is a copy of the indictment and Bill of Particulars served by the United States Attorney, John T. Curtin, and Affidavit of Irving S. Rinde.

DE FILIPPO BROTHERS
Attorneys for Defendant
Office & P.O. Address
408 East Church Street
Elmira, New York

[fol. 6]

ATTACHMENT TO MOTION TO DISMISS INDICTMENT

* * * *

8694-C

BILL OF PARTICULARS

The United States of America in answer to the demand made by the defendant for a bill of particulars dated September 21, 1964, states as follows:

1. It is claimed by the United States that defendant knowingly carried in interstate commerce in violation of § 1953, T. 18, United States Code, 75 written acknowledgements of purchase of State of New Hampshire First Sweepstakes Race of September, 1964.

2. It is not charged by the United States that the defendant violated any State law, ordinances or rules. The United States charges that the defendant violated § 1953, Title 18, United States Code.

Dated: Buffalo, New York, September 24, 1964.

JOHN T. CURTIN
United States Attorney in and for
the Western District of New York
Attorney for Plaintiff
Office and P. O. Address
502 United States Courthouse
Buffalo, New York 14202

[fol. 7]

ATTACHMENT TO MOTION TO DISMISS INDICTMENT

* * * *

AFFIDAVIT OF IRVING S. RINDE

STATE OF NEW YORK)
) SS:
COUNTY OF CHEMUNG)

IRVING S. RINDE, being duly sworn, deposes and says:

That he is an attorney at law and is associated with the firm of DeFilippo Brothers, attorneys for the Defendant herein.

That the Defendant herein is charged only with the carrying in Interstate Commerce in violation of Section 1953, T. 18 United States Code, seventy-five (75) written acknowledgments of purchase of State of New Hampshire first sweepstake race of September, 1964.

That for the purpose of this motion, the Defendant admits that he carried in his possession from the State of New Hampshire to the State of New York seventy-five (75) written acknowledgments of purchase. That a copy of said acknowledgment is attached hereto and made a part hereto and marked Exhibit "A".

That the United States does not charge the Defendant with any violation of any State laws, ordinances or rules.

That Anthony L. Fabrizio, the Defendant herein, is an employee of the Elmira Star-Gazette and has been employed by them for a period of approximately thirty-nine [fol. 8] years. That he has no previous criminal record of any nature.

That he is charged with violation of 1953, Title 18, U.S.C. "interstate transportation of wagering paraphernalia". Said section reads "that whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce

any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or other device, used or to be used or attached, devised or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000.00 or imprisoned for not more than five years or both". That the effective date of this law was September 13, 1961.

That the purpose and intent of this law is set forth in 1961 U.S. Code Congressional and Administrative News at page 553 which states "an act to provide means for the Federal Government to combat interstate crime and to assist the state in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia".

That at the time of the passage of this bill, Robert F. Kennedy, Attorney General, addressed the House of Representatives at Washington, D.C., which address is set forth in 1961 U.S. Code Congressional and Administrative News at page 2636. That the intent as set forth in said address was to provide the Federal Government with another tool to combat forces of organized crime. Attorney General Kennedy further stated in his address "bookmakers and lottery and policy operators presently thrive [fol. 9] on wide scale interstate operations. State law enforcement agencies have been handicapped by jurisdictional limitations to deal with such operations and the Federal Government is handicapped by lack of statutory authority to assert its full power".

That subsequent thereto and on or about the 30th day of April, 1963, the State of New Hampshire put into effect a state lottery which is controlled by lottery commission of the State of New Hampshire and at its head is a former agent of the F.B.I. by the name of Edward J. Powers, who headed the F.B.I. New England operations.

That the purpose of Section 1953 was to help states enforce their laws, and New Hampshire as a soverign state has passed a lottery law where persons can lawfully purchase tickets. There are no provisions which make it a crime of any nature for a person to have in his possession seventy-five written acknowledgments of purchase of the State of New Hampshire sweepstakes race of Sep-

tember, 1964. That the purpose of the statute is to suppress gangsters and professional gamblers and to prevent them from setting up a pool of their own and to make a profit out of gambling. The purpose and statutory intent of the statute was to help states enforce their own laws, but no where has the Defendant violated any laws of the State of New Hampshire, Vermont or New York.

The further purpose of the statute was to reach people who were part of a gambling or lottery enterprise. The Defendant was not any part of the sweepstakes of New Hampshire. Sweepstake tickets are sold only in New [fol. 10] Hampshire. The acknowledgments which were carried by Mr. Fabrizio were not wagering paraphernalia. They had nothing to do with the sweepstake enterprise and were in no way connected with the enterprise. The carrying in interstate commerce of the acknowledgments that are given to customers who purchase said sweepstake tickets has nothing to do with whether or not the customer who has purchased said ticket will get a prize. The acknowledgment need not be retained. It is valueless. The entire transaction takes place in the State of New Hampshire when the customer goes there and, within the state, he buys his ticket. The ticket remains within the confines of the state and payment is subsequently made within the State of New Hampshire. This would be wholly a state matter and would have no effect on interstate commerce. The intention of the acknowledgment is to be sure name and address is correctly registered with New Hampshire commission in New Hampshire.

It is therefore respectfully requested that the Court grant the Order dismissing the indictment herein.

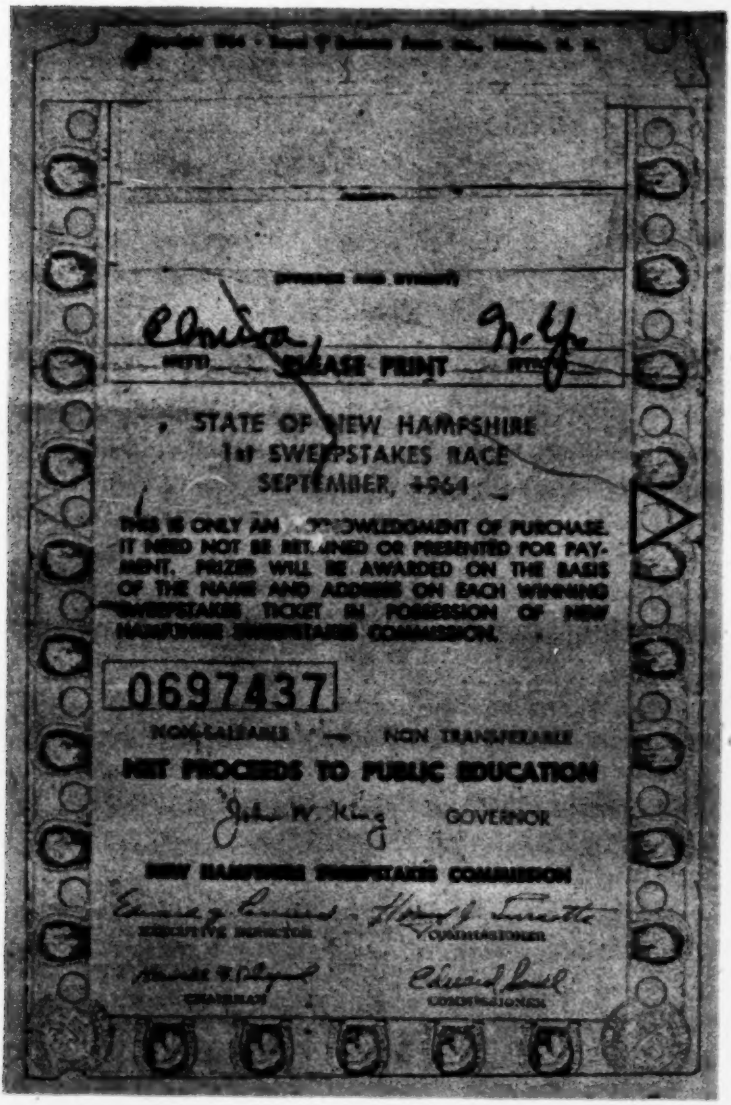
/s/ Irving S. Rinde

Sworn to before me this 9th day of October, 1964.

/s/ Esther L. Mace
ESTHER L. MACE
Notary Public—State of New York
No. 08 7648240—Chemung County
Commission Expires March 30, 1966

[fol. 11]

EXHIBIT "A" TO AFFIDAVIT



STATE OF NEW HAMPSHIRE
1st SWEEPSTAKES RACE
SEPTEMBER, 1964

THIS IS ONLY AN ACKNOWLEDGMENT OF PURCHASE. IT NEED NOT BE RETURNED OR PRESENTED FOR PAYMENT. PRIZES WILL BE AWARDED ON THE BASIS OF THE NAME AND ADDRESS ON EACH WINNING SWEEPSTAKES TICKET IN POSSESSION OF NEW HAMPSHIRE SWEEPSTAKES COMMISSION.

0697437

NON-CALLABLE — NON TRANSFERABLE

NET PROCEEDS TO PUBLIC EDUCATION

John W. King GOVERNOR

NEW HAMPSHIRE SWEEPSTAKES COMMISSION

EXECUTIVE DIRECTOR

COMMISSIONER

CHAIRMAN

COMMISSIONER

[fol. 12]

[File Endorsement Omitted]

[fol. 13]

[File Endorsement Omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

8694-C

UNITED STATES

vs.

ANTHONY L. FABRIZIO

John T. Curtin, United States Attorney,
for the United States

De Fillipo Brothers, Attorneys for Defendant

DECISION AND ORDER—October 5, 1965

Motion by defendant to dismiss the indictment.

The charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act. House Report No. 968, with attached documents to accompany Senate 1657, United States Code Congressional and Administrative News, Volume 2, 87th Congress, First Session, pages 2634-2637.

Motion to dismiss the indictment is granted. So ordered.

/s/ Harold P. Burke
HAROLD P. BURKE
U. S. District Judge

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

8694-C

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 4, 1965

I. Notice is hereby given that the United States hereby appeals to the Supreme Court of the United States from the order entered October 5, 1965 dismissing the indictment charging the defendant with a violation of Title 18, U.S.C. § 1953.

This appeal is taken pursuant to Title 18, U.S.C. § 3731.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Indictment
2. Motion to dismiss indictment and supporting papers
3. Decision and order of the Honorable Harold P. Burke filed on October 5, 1965.
4. Notice of appeal.

III. The following questions are presented by the appeal: Whether the carrying in interstate commerce from New Hampshire to New York of acknowledgements of purchases of chances on a sweepstakes race of the State of New Hampshire, which acknowledgements are alleged to be used, adapted, devised and designed for use in a wagering pool with respect to a sporting event, is an offense within 18, U.S.C., 1953, which prohibits the carrying in interstate commerce of "any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or adapted,

[fol. 16] devised or designed for use in * * * wagering pools with respect to a sporting event."

Dated: Buffalo, New York, November 4, 1965.

/s/ John T. Curtin
JOHN T. CURTIN
United States Attorney in and for
the Western District of New York
Office and Post Office Address
502 United States Courthouse
Buffalo, New York 14202

[PROOF OF SERVICE (omitted in printing)]

[fol. 17]

[File Endorsement Omitted]

[fol. 18]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 19]

SUPREME COURT OF THE UNITED STATES

No. 860, October Term, 1965

UNITED STATES, APPELLANT

v.

ANTHONY L. FABRIZIO

ORDER NOTING PROBABLE JURISDICTION—
February 21, 1966

APPEAL from the United States District Court for the Western District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 211674 680

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the indictment (Appendix, p. 11, *infra*) is not reported.

JURISDICTION

On October 5, 1965, the district court dismissed the indictment on the ground that it did not charge an offense within the purview of 18 U.S.C. 1953 as disclosed in the legislative history of that statute (R. 1, 12). A notice of appeal was filed on November 4, 1965. The jurisdiction of this Court to review on direct appeal a judgment dismissing an indictment on the ground that it does not charge an offense within the meaning of the statute upon which it is

797-624—65——1

founded rests on 18 U.S.C. 3731. *United States* v. *Sampson*, 371 U.S. 75.

STATUTE INVOLVED

18 U.S.C. 1953 provides in pertinent part:

> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetrack or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

* * * * *

QUESTION PRESENTED

Section 1953 of the Criminal Code prohibits knowingly carrying in interstate commerce "any record, paraphernalia, ticket, certificate, bills, slip, token,

paper, writing, or other device used, or to be used, or adapted, devised, designed for use in * * * wagering pools with respect to a sporting event." The question presented is whether an indictment alleging the knowing carrying in interstate commerce from New Hampshire to New York of acknowledgements of purchases of chances on a sweepstakes race to be conducted in the State of New Hampshire charges an offense under the statute.

STATEMENT

On September 3, 1964, an indictment was returned in the United States District Court for the Western District of New York charging (R. 1–2):

> That on or about the 24th day of August, 1964, ANTHONY L. FABRIZIO, knowingly did carry in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, in the Western District of New York, records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U.S.C.

In response to a motion by appellee, the United States on September 25, 1964, filed a bill of particulars, which stated (R. 5):

* * * * *

> 2. It is not charged by the United States that the defendant violated any State law, ordi-

nances or rules. The United States charges that the defendant violated § 1953, Title 18, United States Code.

On October 13, 1964, appellee moved to dismiss the indictment on the ground that the indictment and bill of particulars did not state facts sufficient to constitute an offense against the United States (R. 2–5). The grounds for the motion were set forth in a supporting affidavit of one of appellee's attorneys (R. 6–10). The affidavit, which admitted the carrying of the 75 written acknowledgements of purchase, argued that appellee's actions did not fall within the purpose of the statute, as revealed by its legislative history, "to provide means for the Federal Government to combat interstate crime and to assist the state in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia" (R. 7). It was alleged that appellee was not connected with organized crime, but had been an employee of a newspaper for thirty-nine years; that the State of New Hampshire, subsequent to the enactment of Section 1953, had instituted a State lottery; that appellee had not violated any laws of the States of New Hampshire, Vermont or New York; and that the acknowledgements which he carried were not wagering paraphernalia since the ticket remained in the State of New Hampshire.

On October 5, 1965, the district court sustained the motion, holding that "[t]he charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act." (R. 12.)

THE QUESTION IS SUBSTANTIAL

The district court, on motion of appellee before trial, dismissed an indictment which charged appellee with having knowingly carried from New Hampshire to New York, in violation of 18 U.S.C. 1953, 75 acknowledgments of purchase for a sweepstakes race conducted by the State of New Hampshire. As the basis for its action, the court stated only that the charge in the indictment was not within the purpose of Section 1953 as disclosed by the legislative history. That section (so far as is pertinent here) provides criminal penalties for knowingly carrying in interstate commerce any record or other device intended for use in a wagering pool with respect to a sporting event. Appellee's motion to dismiss the indictment was based on a number of separate grounds, and it is not clear which the district court adopted. We submit that there was no valid ground for dismissal and that the decision below is therefore erroneous; we so demonstrate in the next part of our discussion with a point-by-point refutation of the grounds urged to the district court by appellee. We submit, further, that review by this Court is clearly warranted to correct the unduly restrictive construction placed by the district court upon Section 1953. The effectiveness of this newly enacted provision for the control of interstate gambling operations would be gravely impaired were that court's view of the statute's scope to prevail.

1. Appellee seems to have argued, and the district court may have agreed, that the indictment was defective because the purpose of Section 1953 is to

combat organized crime and appellee was not alleged to be a professional criminal or a member of a gambling syndicate. Not only is there no basis in the language of the statute for requiring proof of affiliation with organized crime to make out an offense, but to inject so vague an element into the definition of the offense would create the gravest practical and constitutional problems. Further, the legislative history makes clear that while one (but by no means the only) concern of Congress was with the gambling operations of criminal rings, the net of liability was intended to be cast wider and embrace all persons within the literal terms of the statute unless covered by one of the express statutory exceptions. See Hearings on H.R. 468 before Subcommittee No. 5 of the H. Committee on the Judiciary, 87th Cong., 1st Sess., pp. 50–51. The background of the enactment reinforces this reading. Congress, in Section 1953, was not breaking new ground. It was seeking merely to tighten up existing federal legislation (18 U.S.C. 1301–1304) which forbade the use of the facilities of interstate commerce to promote gambling. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. No such legislation had ever been limited to persons connected with organized crime.

2. Appellee also argued that Section 1953 does not apply to a lottery which, like the New Hampshire sweepstakes, is legal in the State where held. The statute, however, is not so limited, and its careful pattern of exceptions indicates that no such limitation was intended. Subsection (b)(1) carves out an

exception, inapplicable here, for parimutuel[1] betting permitted under the laws of the State where conducted, and (b)(2) exempts the transportation of betting materials "*into* a State in which such betting is legal under the statutes of the State" (emphasis added). However, nowhere does the statute permit the transportation of non-parimutuel betting materials *from* a State in which such materials are legal. The distinction here drawn by the statute is obviously as deliberate as it is proper: If betting materials were freely transportable from States where they were legal to those where they were illegal, the public policy of the latter States would be undermined.[2] See *Lottery Case,* 188 U.S. 321, 356; cf. U.S. Const. Amend. 21. Finally, it is clear from the legislative history that Congress both knew that there were some State-sanctioned gambling operations and intended that the transportation of the paraphernalia of such operations into States where they were not legal be prohibited. House Hearings, *supra,* p. 344; Hearings on S. 1653

[1] *I.e.*, on-track. See *Mattson* v. *Hollywood Turf Club*, 101 C.A. 2d 215, 219, 225 P. 2d 276, 278.

[2] It appears that New York, the State into which appellee is alleged to have carried the sweepstakes acknowledgements, does forbid this kind of lottery. See New York Penal Law §§ 975, 1371, 1373, 1382. But the government, of course, was not required in the indictment to allege that a statutory exception was inapplicable. See *McKelvey* v. *United States*, 260 U.S. 353, 357; *Edwards* v. *United States*, 312 U.S. 473, 482–483. The statement in the government's bill of particulars to the effect that appellee was not charged with any State-law violation was, of course, not an admission that his conduct violated no State law, but an assurance that the indictment, brought as it was by the United States, charged only a federal offense.

before the S. Committee on the Judiciary, 87th Cong., 1st Sess., pp. 293–294.

3. A related contention—suggested, if not fully elaborated, in the affidavit supporting the motion to dismiss—is that Section 1953 cannot have been intended to forbid a State-operated lottery established after the passage of the statute. But sweepstakes were familiar to the draftsmen of Section 1953, and the chief of the Justice Department's Criminal Division specifically stated that they would be included in the concept of a "wagering pool with respect to a sporting event" (House Hearings, *supra*, p. 352); nor is there any indication that Congress meant to confine the statute to existing sweepstakes.

If appellee's contention is that the New Hampshire sweepstakes has peculiar attributes which make it not a wagering pool with respect to a sporting event within the meaning of the statute, that is a matter of proof to be developed at trial. Such a contention does not go to the sufficiency of the indictment to charge an offense under the statute—the only issue before the district court on appellee's motion to dismiss. See *United States* v. *Petrillo*, 332 U.S. 1, 5.

4. Finally, appellee contended that the "acknowledgements of purchase" to which the indictment refers are outside the scope of the statute since the actual sweepstakes ticket never leaves New Hampshire. However, the very fact that the formal sweepstakes ticket is sold only in New Hampshire and remains there suggests that the acknowledgement of purchase is the out-of-State customer's receipt for the ticket which is purchased in his name by ap-

pellee, and hence is an integral part of the gambling transaction. But even if, as appellee argues, the sole purpose of the acknowledgement is to ensure that the name and address of the ticket holder are correctly registered with the New Hampshire lottery commission, the acknowledgement would still fall within the comprehensive statutory language of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in" a wagering pool with respect to a sporting event. At all events, the question whether these acknowledgements of purchase are in fact gambling paraphernalia, as alleged in the indictment, is plainly one for the trial.

CONCLUSION

Probable jurisdiction should be noted and the judgment of the district court reversed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

DECEMBER 1965.

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

S694–C

UNITED STATES

v.

ANTHONY L. FABRIZIO

John T. Curtin, United States Attorney, for the United States.

De Fillipo Brothers, Attorneys for Defendant.

Motion by defendant to dismiss the indictment.

The charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act. House Report No. 968, with attached documents to accompany Senate 1657, United States Code Congressional and Administrative News, Volume 2, 87th Congress, First Session, pages 2634–2637.

Motion to dismiss the indictment is granted. So ordered.

Harold P. Burke,
HAROLD P. BURKE,
U.S. District Judge.

OCTOBER 5, 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1966

No. [redacted] 47

FILED
FEB 9 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

On Appeal from the United States District Court for the Western District of New York

BRIEF OF THE STATE OF NEW HAMPSHIRE AS *AMICUS CURIAE* PRIOR TO CONSIDERATION OF THE JURISDICTIONAL STATEMENT

WILLIAM MAYNARD,
Attorney General of the State of New Hampshire

JOSEPH A. MILLIMET,
Special Assistant to the Attorney General of the State of New Hampshire

Concord, New Hampshire 03301

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 860

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

On Appeal from the United States District Court for the Western District of New York

---

BRIEF OF THE STATE OF NEW HAMPSHIRE AS *AMICUS CURIAE* PRIOR TO CONSIDERATION OF THE JURISDICTIONAL STATEMENT

INTEREST OF THE *AMICUS CURIAE*

The full effective operation of the Sweepstakes Commission of the State of New Hampshire will inevitably be affected by the disposition of this appeal. Consequently, the State of New Hampshire has an interest which is legitimately to be considered prior to such disposition. In support of that interest, the following argument is offered in opposition to the Jurisdictional Statement as submitted by the appellant.

ARGUMENT

On October 5, 1965, the district court, on motion of appellee before trial, dismissed an indictment which charged that the appellee carried in interstate commerce seventy-five acknowledgements of purchase for a sweepstakes race of the State of New Hampshire. The district court based its dis-

missal of the indictment on the ground that the carrying of such acknowledgements was not within the purpose of Section 1953, Title 18, United States Code, as disclosed in the legislative history of the Act. Cf. *United States v. Kelly*, 328 F.2d 227. In support of its decision, the district court looked to the legislative history of the Act and evidently found in it no indication of a purpose by the Congress to interfere with the conduct by an agency of the government of a State, in pursuit of a legitimate State end, and solely within the confines of the State, of a sweepstakes operation. The intention of the State of New Hampshire, in organizing and operating its sweepstakes, was to aid the development of the educational system of the State. A similar operation has received preliminary approval by the legislature of the State of New York.

In organizing its sweepstakes, the State of New Hampshire provided for a number of safeguards which would insulate the operation from conflict with any of the laws of the United States. Noteworthy among these safeguards were the provisions that the entire operation be conducted within the State of New Hampshire, and that no necessary element in the operation be involved in interstate commerce. These factors provide so substantial a basis for the district court's dismissal of the indictment that they deserve consideration by this Court prior to any disposition on the merits.

The grounds proposed by the district court in dismissing the indictment form a substantial basis for the affirmance by this Court of that dismissal. But even if this Court were, at this time, to judge differently, the case would still demand full consideration by this Court of the many cogent grounds which exist for that dismissal. Such consideration would be both proper and timely, and would be wholly independent of any facts which might be produced by the Government at trial. In support of this position, and in point-by-point opposition to the grounds argued in the Government's Jurisdictional Statement, we submit the following:

1) Implicit in the language and in the legislative history of the Act is a purpose to combat organized crime. Section 1953 purports to prohibit and to penalize persons conducting certain described gambling activities in interstate commerce. It does not purport to prohibit and to penalize all gambling, nor to prohibit or to limit interstate travel for the purpose of going to a State to engage in a gambling activity which is lawfully permitted in that State. Thus, it is of course permissible to travel to Nevada for the sole purpose of shooting craps, or to travel to any State for the purpose of attending the races and placing bets.

As stated in the Government's Jurisdictional Statement, the question is presented whether an indictment lies under Section 1953 for carrying in interstate commerce what is nothing more than an acknowledgement of the fact that the appellee had lawfully travelled to New Hampshire and had lawfully purchased sweepstakes tickets there. It was in New Hampshire, to which the appellee had lawfully travelled, that the appellee lawfully consummated a lawful act of gambling. The question, therefore, answers itself: the purpose and generic prohibition of the Act, as clearly disclosed by its title, is "to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia."

The prohibition is directed against the carrying of some kind of paraphernalia which is an integral and operative part of an unlawful gambling enterprise. But the acknowledgements of purchase are no such thing. As mere indications of a lawfully completed gambling act, they create no rights in the holder, cannot be negotiated, and need not be presented in order to obtain payment of a prize — and all this is stated on the face of the acknowledgement. The bet having been placed, an act of gambling is complete.

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On the face of the Act, the requirement is that the prohibited paraphernalia be "adapted, devised, or designed for use" in the offending gambling enterprise, which, in this case, according to the Government's claim, is a wagering pool conducted by the State of New Hampshire. But these acknowledgements are specifically *not* designed for use in the gambling enterprise. We submit that the acknowledgements are no more "wagering paraphernalia" as defined by the Act and as described in its legislative history than is the dollar "bill" that John Doe carries back from Las Vegas after a game of blackjack. For if the language of the Act is given the all-embracing meaning attributed to it by the Government, the currency of the United States, a draft on a bank, or a traveler's check fall equally under the prohibition of the Act.

It is evident that there are no grounds for the inference that the Congressional purpose was to enact what would amount to federal law against gambling. Even if the Congress possessed the power to enact such a law, there would be serious reason to question the existence today of the kind of "moral" purpose which might, at one time, have motivated the Congress to attempt to do so, under the Interstate Commerce clause or otherwise. Cf. *Lottery Case,* 188 U. S. 320. When the Government speaks of a wide casting of the "net of liability", it takes a position which is tantamount to an assertion that this purpose existed and was translated into the language of Section 1953. We submit that there is no warrant whatever for the extension of this so-called "net of liability" in such a way as to entangle and to thwart an educational-revenue-operation like the New Hampshire Sweepstakes which was enacted by the Legislature of, and is being administered with scrupulous safeguards by an agency of the State of New Hampshire after the enactment by Congress of Section 1953 of Title 18, United States Code.

2) The Government, in its Jurisdictional Statement, has so construed the exceptions provided in the Act as to

carve out a uniquely privileged field for pari-mutuel betting and state-sanctioned betting. The Government argues that "if betting materials were freely transportable from states where they were legal to those where they were illegal, the public policy of the latter states would be undermined." Here, however, we do not have the situation of state-sanctioned betting but of state-operated betting. Neither do we have the situation of interstate transportation of betting materials, since, as has been shown, all elements integral to the betting procedure are retained within the sponsoring state. In short, the Government has construed the exceptions in the strictest possible fashion and has given no weight to the absence of any conscious prohibition in the Act of anything related to a lawful gambling enterprise. The specific exceptions clearly illustrate that state-sanctioned gambling operations were to be immune from the penalties imposed by the Act itself.

3) There is no need to dispute the Government's contention that the draftsmen of Section 1953 were familiar with sweepstakes or with lotteries. We submit that a substantial difference in kind exists between the conduct of a sweepstakes by a gambling syndicate or by a private individual, and the conduct of a sweepstakes by one of the States of the Union. It must be seriously questioned whether there was any intent by the Congress to enact a law which would treat both operations in the same way and would make criminal what is otherwise legitimate revenue-raising activity by one of the States. Here again, it must be questioned whether the purpose of the Congress was to foster the suppression of the act of gambling, wherever it exists, rather than simply to control and to penalize the explicitly and notoriously interstate operations of syndicated gambling. Yet this would be the net effect of the Government's construction of the Act. We submit, further, that the "peculiar attributes of the New Hampshire Sweepstakes," referred to by the Government, have already been shown to exempt that sweepstakes from the coverage of the Act.

4) We have also shown that there is no need for further marshaling of facts, appropriately the province of the trial court, to demonstrate that the acknowledgements of purchase were neither used nor designed for use in the sweepstakes, but were merely incidental to the sweepstakes, and performed no necessary or integral function within the sweepstakes. And even if it were to be decided that they were "used" or "designed for use", we have shown that this was not a use in conjunction with "a wagering pool with respect to a sporting event" which was within the purview of the Act. Consequently, there is no need for a trial to dispose of this point.

CONCLUSION

The judgment of the district court should be affirmed, or, probable jurisdiction having been noted, the case should be set down for briefs and oral argument on the merits of the district court's dismissal of the indictment.

Respectfully submitted,

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Attorney General of the
State of New Hampshire

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February 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 47

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 10) is not reported.

JURISDICTION

The order of the district court was entered on October 5, 1965 (R. 10). The notice of appeal was filed on November 4, 1965 (R. 11–12), and this Court noted probable jurisdiction on February 21, 1966 (R. 13; 383 U.S. 904). The jurisdiction of this Court rests on 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1953 provides as follows:

> § 1953. Interstate transportation of wagering paraphernalia
>
> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) pari mutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. * * *

QUESTION PRESENTED

Whether an indictment alleging the knowing interstate carriage of acknowledgements of purchase to be used, and adapted, devised and designed for use, in a

New Hampshire lottery charges an offense under 18 U.S.C. 1953.

STATEMENT

On September 3, 1964, an indictment was returned in the United States District Court for the Western District of New York alleging that appellee knowingly carried in interstate commerce from New Hampshire to New York "records, papers and writings, to wit: 75 acknowledgments of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire * * *" (R. 3). On September 24, 1964, in response to a motion by appellee, the United States filed a bill of particulars, stating that "[i]t is not charged by the United States that the defendant violated any State law, ordinances or rules. The United States charges that the defendant violated § 1953, Title 18, United States Code" (R. 5).

On October 12, 1964, appellee moved to dismiss the indictment on the ground that the indictment and bill of particulars did not state facts sufficient to constitute an offense (R. 4). The grounds for the motion were set forth in a supporting affidavit of one of his attorneys (R. 6–9). While admitting that appellee carried the sweepstakes acknowledgments, as charged, the affidavit argued that appellee's conduct did not fall within the purview of the statute. The affidavit alleged that the purpose of the law was, as set forth in its title, " 'to provide means for the Federal Gov-

ernment to combat interstate crime and to assist the state [sic] in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia,'" and that the legislative history revealed an intent "to provide the Federal Government with another tool to combat forces of organized crime" (R. 7). It further alleged that appellee was not connected with organized crime or part of a lottery enterprise; that he had not violated any State law; that the State of New Hampshire had established its lottery after enactment of Section 1953; and that the acknowledgments which he carried were not wagering paraphernalia because New Hampshire retains custody of its lottery tickets and does not require presentation of the acknowledgment for payment of the prize.

On October 5, 1965, the district court dismissed the indictment. Citing House Report No. 968, 87th Cong., 1st Sess., the court stated only that "[t]he charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act" (R. 10).

SUMMARY OF ARGUMENT

The present indictment—closely paralleling the statutory language—charges an offense under 18 U.S.C. 1953. The language of the statute clearly proscribes the conduct outlined in the indictment, and an examination of the structure and background of the Act demonstrates that the statute means exactly what its plain words convey.

The Act contains no exemption for legal or State-sponsored lotteries. On the contrary, its careful pattern of exemptions—for parimutuel material, newspapers, and the transportation of certain sports betting material *into* a State where such betting is legal—precludes the creation, by interpretation, of a further exemption for the transportation of non-parimutuel material, not for use in wagering on a sporting event, *from* a State where the material is legal. Indeed, such an added exemption would frustrate the Act's purposes; like the earlier federal anti-lottery laws with which it must be considered, this statute was designed to prevent one State's legal gambling from undermining the anti-gambling policies of the majority of States. Congress, well aware of the scope of the statute, plainly proposed to cover legal as well as illegal lotteries.

Nor is the Act limited to persons connected with organized crime or a lottery enterprise. The inclusion of such an exemption in the Act would have created grave practical and constitutional problems. That such an exemption was not intended is underscored by the limitation of a companion measure to persons "engaged in the business of wagering" and the exceptions for newspapers and parimutuel betting in Section 1953 itself. While Congress may have been primarily motivated by a desire to combat organized crime, this was not its only goal.

Finally, it is clear that the acknowledgements of purchase carried by appellee are not, as a matter of law, excluded from the Act. The deliberate breadth

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of the statutory language—designed to obviate restrictive judicial interpretations—indicates that any paper which has a use in a lottery operation and facilitates wagering is included. Whether the particular acknowledgements had such a use in this case, as charged, is a question for the trier of fact. The government expects to prove that the acknowledgements were used to enable persons who remained in New York, where lotteries are illegal, to participate in the sweepstakes through the agency of appellee, who was engaged in the business of purchasing the tickets for a fee. To exclude such acknowledgements as a matter of law would impair Congress' effort to close the channels of interstate commerce to wagering material and to prevent interference with State anti-gambling policies.

ARGUMENT

AN INDICTMENT ALLEGING THE KNOWING INTERSTATE TRANSPORTATION OF ACKNOWLEDGEMENTS OF PURCHASE TO BE USED, AND ADAPTED, DEVISED AND DESIGNED FOR USE, IN A NEW HAMPSHIRE LOTTERY CHARGES AN OFFENSE UNDER 18 U.S.C. 1953

Section 1953 (*supra*, p. 2) is a comprehensive measure specifically "designed to prevent the easy interstate transportation of wagering paraphernalia." H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. It prohibits anyone "except a common carrier in the usual course of its business" from knowingly carrying in interstate commerce "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wag-

ering pools with respect to a sporting event; or (c) in a numbers * * * or similar game * * *." The exemptions from this prohibition are narrow and explicit; the Act does not apply to carriage of legally acquired parimutuel tickets, legally used parimutuel material and equipment, material to be used in betting on a sporting event transported into a State where such betting is legal, or newspapers. The present indictment, tracking the statutory language, charges appellee with knowingly carrying "records, papers and writings * * * to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event," specifically "acknowledgements of purchase for a sweepstakes race of the State of New Hampshire" (R. 3). The charge falls squarely within the range of the Act's prohibitions and there is nothing to bring it within any of the narrow statutory exemptions. Nor is there anything in the legislative history which would warrant a departure from the Act's plain terms.[1]

[1] The committee report relied on by the court below makes clear that the purpose of the Act is fully disclosed by the statutory language. Under the caption "Purpose of the bill", the report notes (H. Rep. No. 968, 87th Cong., 1st Sess., p. 2):

"The purpose of the bill, as amended, is to prohibit * * * the transportation in interstate or foreign commerce, except by common carrier in the usual course of its business, of any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game."

A. THE STATUTE APPLIES TO LEGAL AS WELL AS ILLEGAL LOTTERIES

The district court's decision may have been based on the view that, since the lottery in question was legal in New Hampshire, Section 1953 does not apply. Such an interpretation, however, would virtually nullify the Act since it would allow the carriage of wagering paraphernalia from the few places where wagering is legal[2] to any other place in the country. And both the language and the history of the Act preclude this construction.

The statute contains no express exemption for legal lotteries, and it is obvious that none was intended. Subsection (b)(1) carves out an exception for material related to legal parimutuel betting, and (b)(2) permits material used in betting on sporting events to be transported "*into* a State in which such betting is legal under the statutes of the State" (emphasis supplied). This deliberate pattern of exemptions surely forbids the interpolation of an additional exemption—plainly not provided in the Act—for transportation of non-parimutuel wagering material, not for use in betting on sporting events, *from* a State in which such wagering is legal. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 216–217; *United States* v. *Borden Co.,* 308 U.S. 188, 201.

The reason for the distinctions carefully drawn in the Act is clear: If betting material was freely transportable from States where it was legal to those where

[2] See, *e.g.*, Nev. Rev. Stat. §463.160 (horse race books and sports pools).

it was illegal, the public policy of the latter States would be undermined.[3] While Congress left any State free to legalize gambling within its borders, it sought to ensure that, in so doing, that State would not interfere with the policies of the other States, the majority of which do not permit gambling. See *Minter* v. *Federal Trade Commission*, 102 F. 2d 69, 73 (C.A. 3); 108 Cong. Rec. 9266. Accordingly, betting material relating to a sporting event may be brought into a State where such betting is permitted by statute,[4] but it may not be brought into any other State. And since there is little room for trafficking in parimutuel tickets,[5] these may be transported out of State if legally acquired. But other betting material, such as

[3] It is interesting to note that approximately 87% of the winners in the 1964 New Hampshire Sweepstakes resided out of State. See 110 Cong. Rec. A5494. Winners were from 37 States, the District of Columbia, the Canal Zone, Canada and Ireland. Winners of the 1965 sweepstakes were from 35 States, the District of Columbia, Canada, Germany and the Philippines. See New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program* 9 (1965).

[4] Note that the exemption for transportation of betting material into States where betting is legal is strictly limited to "materials to be used in the placing of bets or wagers on a sporting event." Thus it has been held that lottery material is not within the exemption of subsection (b)(2). *United States* v. *Baker*, Nos. 15572 and 15573, C.A. 3, decided July 28, 1966, involving a lottery legal under the laws of Haiti.

[5] Parimutuel bets can only be placed at a race track, and the winning tickets can only be redeemed at the same track. Ordinarily, the race is run a short time after the bet is placed. See *Opinion of the Justices*, 249 Ala. 516, 517, 31 So. 2d 753, 754.

the papers involved here, may not be carried in interstate commerce, no matter how they were acquired.

The immateriality of the fact that a lottery may be legal in the State where it is conducted is made even more apparent upon examination of the other federal anti-lottery statutes, in the context of which Section 1953 must be considered. Although early federal laws forbade only the mailing of matter "concerning illegal lotteries" (15 Stat. 196; 17 Stat. 302; Rev. Stat. 3894), Congress eliminated the word "illegal" in 1876. Act of July 12, 1876, 19 Stat. 90; see *Horner* v. *United States*, 147 U.S. 449, 466. This was designedly done to prohibit one State from interfering with the policy of another. As Senator Morrill pointed out in the debate on the 1876 measure (4 Cong. Rec. 4262):

> * * * [I]t is obvious that if thirty-six States were to make the most penal statutes against lotteries, and the mails were open to one that allowed lotteries, the laws of the thirty-six States would be rendered nugatory, because all the people of the thirty-six States could obtain their tickets from this one State as well as though they were authorized from the whole. Therefore if the matter is allowed to run through the mails, any laws by any State against lottery tickets are entirely valueless.

In 1895, Congress supplemented this provision with an act prohibiting the transportation and importation of lottery tickets. 28 Stat. 963; see *Lottery Case*, 188 U.S. 321, 354. Since that time, there has been no serious doubt that the anti-lottery statutes (now 18 U.S.C. 1301–1305) embrace all lotteries, even if

authorized or sponsored by a State.[6] In addition to other legal or illegal lottery material, Section 1302 now specifically prohibits the mailing of "[a]ny article described in section 1953 * * *." Act of Sept. 13, 1961, 75 Stat. 492 (the same statute which added 18 U.S.C. 1953). It cannot be assumed that Congress intended the new part of section 1302 to apply only to illegal lotteries while the older parts apply to legal or illegal lotteries. In the light of this close relationship between the Act in question and the older anti-lottery statutes, it would be anomalous for the courts to superimpose an exception for legal lotteries, not present in the older statutes, on Section 1953. The latter enactment was designed to fortify the earlier prohibitions.

Congress was unmistakably aware of the scope of the earlier anti-lottery acts when it enacted Section 1953,[7] and it understood that the new legislation, like the old, would apply to legal as well as illegal lotteries.[8] The bill which ultimately became Section

[6] Several States had legal lotteries in 1876. See 4 Cong. Rec. 4262. In at least two, Louisiana and Kentucky, lotteries were operated under State auspices, contributing part of their receipts to State or local treasuries. See Spofford, *Lotteries in American History* in American Historical Ass'n, Annual Report for 1892, S. Misc. Doc. No. 57, 52d Cong., 2d Sess., pp. 173, 190; *Douglas* v. *Kentucky*, 168 U.S. 488. See also *Stone* v. *Mississippi*, 101 U.S. 814. Congress has never distinguished between lotteries authorized by a State and those sponsored by a State, and there is no room for such a distinction in the construction of Section 1953.

[7] See, *e.g.*, Hearings on H.R. 468 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 344 (remarks of Assistant Attorney General Miller.)

[8] See Hearings on S. 1653 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., p. 294:

"Senator KEFAUVER. Mr. Miller, does not all of this book-

1953 (S. 1657, 87th Cong., 1st Sess.) was one of a series of antigambling bills sponsored by the Department of Justice.[9] The title of the bill was substantially the same as that of the final enactment: "A bill to provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia." And the text of the bill, which contained no exceptions, was identical to the text of present Section 1953 (a). In the extensive hearings held in both houses of Congress, both supporters and critics of the measure pointed out its comprehensive scope. See, *e.g.*, House Hearings, pp. 30, 50, 57; Senate Hearings, p. 293. See also *United States* v. *Kelly*, 328 F. 2d 227, 230–231 (C.A. 6). It was made clear, for example, that the statute covered papers related to a sweepstakes—including those conducted with governmental approval, such as the Irish Sweepstakes. House Hearings, p. 352 (testimony of Assistant Attorney General Miller).

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making, wagering pool, and so forth mean where it is not legal by State law?

"Mr. MILLER. No, sir.

"That proviso is not in here. It was the position of the Department that these types of paraphernalia, records, and other devices should be barred from interstate commerce."

[9] Among the bills in this program were (1) S. 1653 (similar to H.R. 6572), a bill prohibiting travel or transportation in aid of racketeering enterprises, enacted into law as 18 U.S.C. 1952; (2) S. 1656 (similar to H.R. 7039), a bill prohibiting the use of wire communication facilities for the transmission in commerce of wagers or information assisting wagering, enacted into law as 18 U.S.C. 1084; and (3) S. 1658, a bill amending the act prohibiting the transportation of gambling devices in commerce.

Out of concern that the breadth of the statute might interfere with freedom of the press, and in deference to State laws permitting betting on sporting events, the Senate created the specific exemptions contained in subsection (b),[10] preserving, at the same time, the bill's comprehensive prohibitions where newspapers and legal betting on sports are not involved. See S. Rep. No. 589, 87th Cong., 1st Sess., pp. 2–3. The House adopted the Senate version in substance, noting that the purpose of the bill was to extend the long-established prohibition against interstate transportation of lottery tickets to all gambling papers adapted for use in connection with a lottery or sporting event. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. In none of the deliberations on the statute was it ever suggested that the Act would not apply to legal lotteries. On the contrary, it was fully understood that the statute would have the scope indicated by its unambiguous language and would forbid the interstate carriage of papers designed for use in *any* "wagering pools with respct to a sporting event."

In its *amicus* brief filed in response to the jurisdictional statement, the State of New Hampshire contended that its sweepstakes embodied peculiar attributes which, as a matter of law, exempted it from the coverage of Section 1953. As we have shown, this is not the case. Congress could, of course, create a special exemption from Section 1953 for papers re-

[10] Subsections (b)(1) and (b)(3) were first adopted in the Judiciary Committee. Subsection (b)(2) was offered as an amendment on behalf of the Committee by its chairman on the floor of the Senate. See 107 Cong. Rec. 13902.

lating to the New Hampshire Sweepstakes, similar to the exemption from the federal wagering tax enacted in 1965. Act of June 21, 1965, 79 Stat. 170; 26 U.S.C. 4402(3) (Supp. I, 1965).[11] Although several bills have been introduced in recent years which would exempt State-operated lotteries from the prohibitions of 18 U.S.C. 1301–1304 (H.R. 6716, H.R. 7856, 88th Cong., 1st Sess.; H.R. 1106, 89th Cong., 1st Sess.), none has been enacted. In the absence of congressional action, the courts are not free to manufacture an exception to the clear mandate of the Act.

B. THE STATUTE IS NOT LIMITED TO PERSONS CONNECTED WITH ORGANIZED CRIME OR A LOTTERY ENTERPRISE

Congress defined the persons covered by Section 1953 in comprehensive terms: "Whoever, except a common carrier in the usual course of its business." This language plainly includes every person, not a common carrier, who transports the prohibited paraphernalia; it cannot be confined to persons affiliated with organized crime or organized gambling. Indeed, a specific provision limiting the Act's application to professional criminals or members of gambling syndicates would have created grave practical and contitutional problems. See *Lanzetta* v. *New Jersey*, 306 U.S. 451 (invalidating statute applicable only to "gangsters").

[11] This exception applies only to wagers "placed with the State agency conducting such sweepstakes * * * or with its authorized employees or agents." Thus, under the proof we expect to adduce in this case (see *infra*, pp. 18–19), this tax exemption would probably not apply to the persons for whom appellee purchased sweepstakes tickets.

It is significant that Congress limited the application of 18 U.S.C. 1084—enacted with Section 1953 as part of a single legislative "package"—to persons "engaged in the business of wagering." The inclusion of this limitation in a companion statute underscores the purposeful omission of any such restriction in Section 1953. Moreover, the specific exemptions for the carriage of parimutuel tickets and newspapers, provided in Section 1953 itself, clearly indicate the general applicability of the Act. For if only persons affiliated with organized crime or a gambling enterprise were included, there would have been little, if any, need for these exceptions.

We do not doubt that, in enacting Section 1953 and the related anti-gambling statutes, Congress was primarily motivated by a desire to suppress organized crime. But the reach of a statute often goes beyond the immediate evil which prompted its enactment. See, *e.g., Caminetti* v. *United States,* 242 U.S. 470 (rejecting the interpretation that the Mann Act is limited to "commercialized vice"). Moreover, the legislative history of the Act affirmatively shows that it was intended not only to combat organized crime, but to strengthen existing federal legislation closing the channels of interstate commerce to lottery paraphernalia.[12] See *supra,* pp. 6–7, 11–13; *infra,* pp. 17–18.

[12] The Attorney General's comment with reference to the companion measure forbidding the interstate transmission of wagers is instructive (House Hearings, p. 26): "It cannot be overemphasized that this bill is designed first, to assist the States and territories in the enforcement of their laws pertaining to gambling and like offenses. Second, the bill

C. "ACKNOWLEDGEMENTS OF PURCHASE," AS WELL AS ACTUAL LOTTERY TICKETS, ARE COVERED BY THE STATUTE

Appellee argued in the court below that the acknowledgements of purchase which he carried from New Hampshire to New York were not covered by the Act because they were not lottery tickets and did not have to be presented in order to collect the sweepstakes prize.[12] The statute, however, covers not only lottery tickets but "any record, paraphernalia, ticket, certificate bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in * * * wagering pools with respect to a sporting event." And the statutory prohibition is not limited to papers which are essential to a lottery operation; transportation of any papers which have a use in that operation and facilitate wagering is prohibited by Section 1953.

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would in that regard help suppress 'organized' gambling * * *." Note also the statement of the chairman of the House Judiciary Committee, upon opening debate on Section 1953 on the floor of the House, that "[t]he primary purpose is to prevent the transportation in interstate commerce of wagering material." 107 Cong. Rec. 16537.

[12] The purchaser of a New Hampshire lottery ticket writes a name and address, not necessarily his own, on the "ticket," which is held in a specially designed machine. When the sale is consummated, the "ticket" is retained in the machine and the "acknowledgement," bearing a copy of the name and address shown on the ticket, is ejected. The tickets remain in the State. After the drawing, the person whose name appears on each selected ticket is notified by telegram. After the sweepstakes race, the prize money is deposited in a New Hampshire bank to the credit of those named on the winning tickets, and the winners are thereafter paid through normal banking channels. New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program* 5, 7–8 (1965).

Congress purposely used broad language in describing the proscribed wagering materials to obviate the restrictive interpretation which the courts had placed on less comprehensive terms in previous anti-lottery measures. Two decisions in particular severely limited the scope of the statute forbidding the interstate transportation of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery * * *." Act of March 2, 1895, ch. 191, 28 Stat. 963. In *France* v. *United States*, 164 U.S. 676, 682, the Court held that the Act applied only to papers representing "an existing chance or interest which is dependent upon the event of a future drawing of the lottery."[14] In *Francis* v. *United States*, 188 U.S. 375, the Court held the statute inapplicable to the original betting slips retained by the lottery for accounting purposes. These, unlike the duplicate slips retained by the bettor, did not represent the bettor's interest in the lottery and were not the means by which he made good his claim to a prize.

Supporters of the broad language in Section 1953 made pointed reference to these and other restrictive interpretations of the existing statute, stating that "[t]he proposed statute is designed to close the most important loopholes resulting from the above decisions." House Hearings, p. 30; Senate Hearings, p. 9 (statements of Attorney General Kennedy). Assistant Attorney General Miller argued against the adoption of S. 527, which would have forbidden only the

[14] See also *United States* v. *Halseth*, 342 U.S. 277.

interstate transportation of "records or paraphernalia" (Senate Hearings, pp. 291–292), and emphasized the need "to declare the legislative goal with sufficiently inclusive language." House Hearings, p. 351. In enacting Section 1953, both Houses expressly accepted the Justice Department's view of the breadth of the statute. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2; 107 Cong. Rec. 13902.

Against this background there is no room for an argument that Congress intended to limit the statute to those papers which are an "integral and operative part" of the wagering operation.[15] It is immaterial that the acknowledgements, like the original betting slips in *Francis, supra,* did not represent the bettor's interest in the lottery or his means of obtaining a prize. It is sufficient that, as alleged in the present indictment, the papers were "to be used, and [were] adapted, devised and designed for use" in the sweepstakes. The question whether, in fact, the acknowledgements carried by appellee were so used, adapted or designed is not before this Court on this direct appeal. See *United States* v. *Petrillo,* 332 U.S. 1, 5; *United States* v. *Borden Co.,* 308 U.S. 188, 193. That is a question for the district court at trial. The government expects to prove that the acknowledgements were used to enable persons who remained in New York to bet on the sweepstakes through the agency of appellee, who was engaged in the business of purchasing the tickets for a fee, and that the acknowledge-

[15] Brief of the State of New Hampshire as *Amicus Curiae,* p. 3.

ments served to assure appellee's customers that tickets had in fact been purchased in their names. If this is shown, the trier of fact could assuredly find that the acknowledgements were used and adapted for use in a wagering pool.[16]

To exclude acknowledgements of purchase from the comprehensive prohibitions of the Act would run counter to the congressional purpose to close the channels of interstate commerce to wagering material and prevent interference with State anti-gambling policies. Although the lottery in question is legal in New Hampshire,[17] papers such as the acknowledgements carried by appellee, if freely transportable, can be used to thwart the laws of other States. In New York, the State to which appellee was charged with carrying the papers in question, the State constitution prohibits lotteries and the sale of lottery tickets. N.Y. Const., Art. I, § 9. By statute, New York prohibits the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" the State, regardless of whether the lottery is "authorized or not by the laws of the state where

[16] Appellee did not contend below that the New Hampshire Sweepstakes is not a "wagering [pool] with respect to a sporting event," and it is clear that sweepstakes operations were intended to be covered by the Act. See House Hearings, p. 352.

[17] Appellee's alleged activities, however, would no longer be permissible in that State. Since the bringing of this indictment, the purchase of tickets for a fee on behalf of others has been made a misdemeanor. N.H. Rev. Stat. Ann. § 284: 21–o. It should be noted that the effectiveness of this statute may be limited since, by the time a violation by a person from out of State is discovered, the violator would probably be beyond the reach of New Hampshire authorities.

[it is] drawn or to be drawn." N.Y. Penal Law §§ 1373, 1382. See also N.Y. Penal Law §§ 975, 1370, 1371.[18] The decision below permits the use of the acknowledgements in such a manner as to undermine New York's policy, expressed in those enactments. This is just what the federal statute, by its comprehensive terms, was designed to prevent.

[18] The statement in the government's bill of particulars that appellee was not charged with any State-law violation does not suggest the contrary. It merely indicates that the only charge appellee was called upon to meet was one arising under federal law. The government's memorandum in response to appellee's motion to dismiss, which noted that "[a] lottery is not legal in New York State," properly pointed out that "it is not necessary to find the defendant in violation of any State Law before there is a violation of" Section 1953 and that "State Law is relevant * * * only with respect to the exceptions in subdivision (b)." Of course, the indictment need not allege that a statutory exception was inapplicable. See *McKelvey* v. *United States*, 260 U.S. 353, 357; *Edwards* v. *United States*, 312 U.S. 473, 482–483. In any event, the bill of particulars filed in this case could not affect the sufficiency of this indictment. See *United States* v. *Comyns*, 248 U.S. 349, 353; *Dunlop* v. *United States*, 165 U.S. 486, 491.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should reverse the judgment below and reinstate the indictment.

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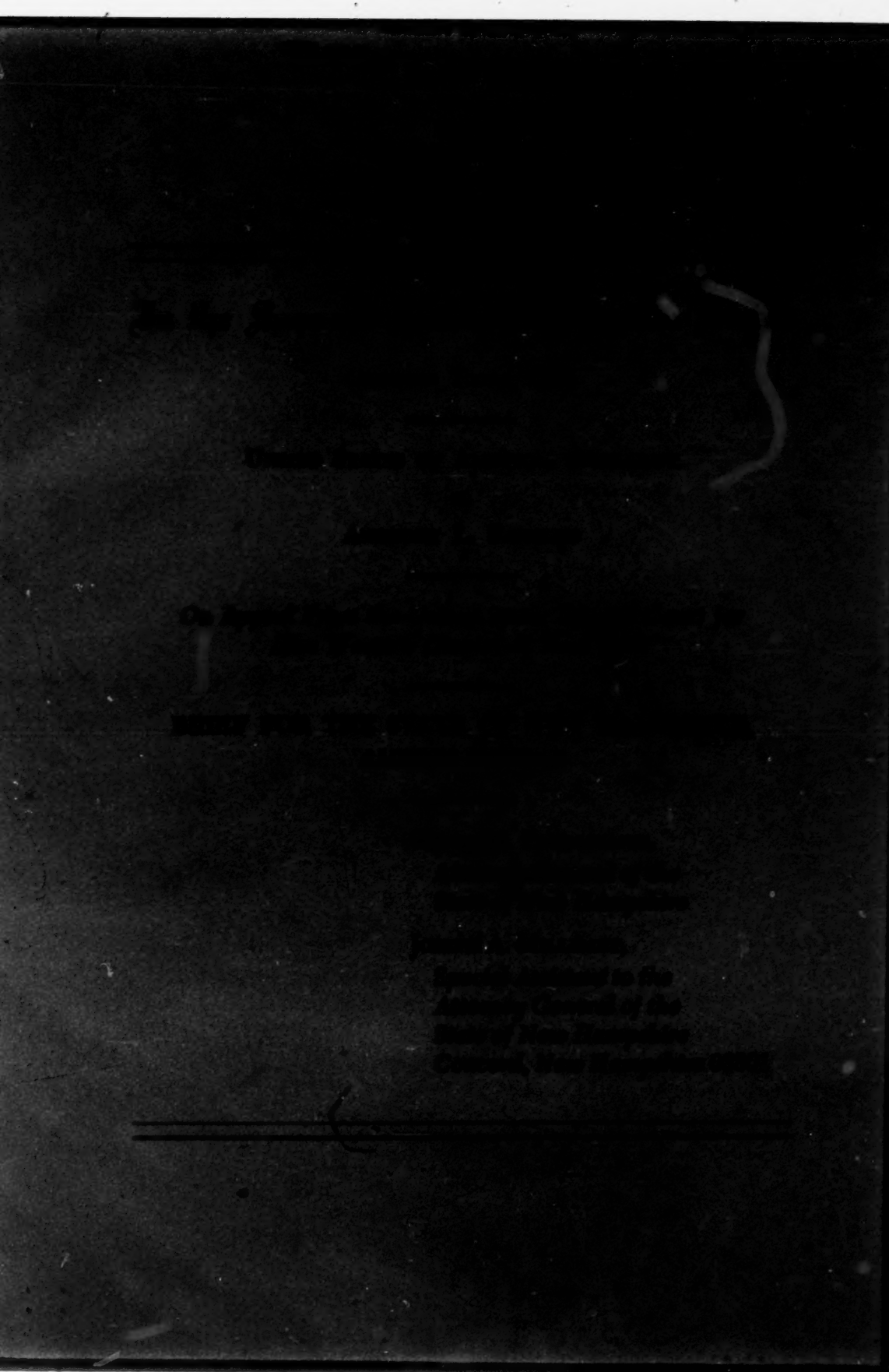

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 47

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE STATE OF NEW HAMPSHIRE, *AMICUS CURIAE*

THE INTEREST OF THE *AMICUS CURIAE*

The State of New Hampshire is vitally concerned in the outcome of this case. Although accurate statistics are not available, the distribution of prize winners among 41 States, the District of Columbia, and 7 foreign countries, indicates that a great many New Hampshire Sweepstakes tickets are purchased by tourists on their visits to New Hampshire.[1] All of the purchasers receive an acknowledgement of purchase similar to the acknowledgements which form the basis of the indictment in this case. If a purchaser can be indicted for a federal crime merely because he transports a New Hampshire Sweepstakes acknowledgement of purchase in interstate or foreign com-

[1] News Release, New Hampshire Sweepstakes Commission, September 22, 1966.

merce, then New Hampshire's fiscal experiment in attempting to raise money for education by its modest Sweepstakes Program is seriously threatened. It is the position of the State of New Hampshire that such a result was never the intention of Congress when it enacted 18 U.S.C. 1953 or any of the other anti-crime statutes passed by the 87th Congress.

The New Hampshire Sweepstakes Program is the only lottery in American history specifically designed to avoid conflict with federal law and the laws of other States. This has been accomplished by three salutary rules, one statutory and two administrative in origin.

By statute (N. H. Rev. Stat. Ann. 284:21-h), sweepstakes tickets may be sold only at specified, closely-controlled locations within the State. Except for sales at the two State-licensed race tracks, all sweepstakes tickets are sold on State-owned and operated premises. Sales at the tracks are by State employees only.[2] By administrative order of the Sweepstakes Commission,[3] no tickets are sold in blank; each must bear the name and address of the owner. All tickets are retained in the possession of the Sweepstakes Commission; only an acknowledgement of purchase is delivered to the purchaser.[4] Payment is made to the owner whose name is registered on the original ticket by deposit in a New Hampshire bank or by delivery of a State

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[2] See New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program, An Aid to Education*, 4 (1965). Cited hereinafter as *New Hampshire Sweepstakes Program.*

[3] The statute (N. H. Rev. Stat. Ann. 284:21-a, i) created a three-member commission and gave the commission full authority "to make rules and regulations for the holding and conducting of such sweepstakes races, and the sales of tickets thereon . . ."

[4] *New Hampshire Sweepstakes Program*, 4.

check delivered to the winners within the State of New Hampshire.[5]

The Commission also has strict internal controls. All tickets are dispensed from specially-designed machines. They are collected daily, deposited with banks in various parts of the State, and ultimately deposited in a clearing house bank vault in Manchester, which keeps track of them by computer and electronic data-processing equipment.[6]

The tightly-controlled system run by the Sweepstakes Commission insures the integrity of the program and guarantees avoidance of the abuses of past lotteries.[7] For example, it is impossible to run an illegal insurance or policy lottery on the New Hampshire Sweepstakes because numbers are not used in selecting New Hampshire Sweepstakes winners. Since the acknowledgements of purchase are not transferrable or assignable, and because they cannot be exchanged for a prize, New Hampshire Sweepstakes chances cannot be re-sold or delivered as "an interest in a lottery" to persons in other States.

The New Hampshire Sweepstakes Program precludes violation of either federal law or the law of other States by requiring that all essential steps in the act of gambling take place within the State of New Hampshire. It recognizes and follows the precept that gambling is a form of social activity ordinarily beyond the control of the Federal Government, and subject to control within each State by the respective State governments.[8] New

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[5] *Id.* at 8.

[6] *Id.* at 7.

[7] Ezell, *Fortune's Merry Wheel*, 243-269 (1960).

[8] *Lottery Case*, 188 U.S. 321, 357, where the court said, "Congress, by that act [now 18 U.S.C. 1301], does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of

Hampshire has as much constitutional power to permit gambling within its borders as New York has to prohibit it.[9] But neither New York nor the Federal Government has the power to prohibit free travel to New Hampshire by any citizen of the United States for the purpose of engaging in any activity which is lawful in New Hampshire.

The right to move freely from State to State is a right of national citizenship, protected by the privileges and immunities clause of the Fourteenth Amendment against State interference. See *Edwards* v. *California*, 314 U.S. 160, 181. Cf. *Kent* v. *Dulles*, 357 U.S. 116. Similarly, the words "privileges and immunities" in the Federal Constitution, Article IV, Section 2, are words of very comprehensive meaning, and the clause in which they are contained secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade and business, without molestation. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60. The right to move from one place to another according to inclination is an attribute of personal liberty, and the right of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment. *Williams* v. *Fears*, 179 U.S. 270. Cf. *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35. The Government recognizes that the New Hampshire Sweepstakes Program is lawfully operated and no one has suggested that citizens may not travel to New Hampshire to buy tickets.[10]

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any state, but has in view only commerce of that kind among the several states." *United States* v. *Kahriger*, 345 U.S. 22.

[9] It is noteworthy that New York is approaching its final referendum to legalize a New Hampshire type of sweepstakes in that state. N. Y. Times, Sept. 14, 1966, p. 1, col. 1. (City ed.).

[10] Attorney General Kennedy, testifying before the Senate Judiciary

The Congress has recognized and approved the integrity of the New Hampshire Program. The 89th Congress added a special subsection to the Wagering Tax statute, exempting State-operated sweepstakes races from the tax[11] retroactively to March 10, 1964,[12] the date the people of New Hampshire, by popular referendum, approved the sale of sweepstakes tickets. This had the additional effect of excusing all Sweepstakes salesmen from purchasing the $50.00 tax stamp and from keeping regulatory records required of gamblers.[13] The wagering tax has been held to have a purpose to suppress illegal wagering.[14] The willingness of Congress to treat the New Hampshire Sweepstakes on a par with pari-mutuels is inconsistent with any contention that the New Hampshire Program is covered by 18 U.S.C. 1953. And the fact that Congress took no action with regard to Section 1953 merely raises the inference that none was thought necessary.

SUMMARY OF ARGUMENT

It is the position of the State of New Hampshire that the special safeguards inherent in the New Hampshire Sweepstakes

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Committee on S. 1653 (now 18 U.S.C. 1952), said: "Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill . . . The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' . . . Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." *Senate Hearings*, pp. 15-16.

[11] P.L. 89-44 §813(a), amending 26 U.S.C. 4402.

[12] *New Hampshire Sweepstakes Program*, 3.

[13] It put the New Hampshire Sweepstakes on a par with pari-mutuel wagering. 18 U.S.C. 4401, 4402, 4403, 4411.

[14] *United States* v. *Kahriger*, 345 U.S. 22, 28.

Program preclude violation of 18 U.S.C. 1953 (or of any other federal statute) unless it is shown that carriage of the allegedly offensive papers in interstate commerce is part of an illegal wagering enterprise regularly conducted outside the scope of the New Hampshire Sweepstakes. Since the present indictment is based upon a single instance of carrying acknowledgements from Keene, New Hampshire to Elmira, New York, and there is no allegation of a continuing enterprise, the charge does not fall within the purview of the statute. Inasmuch as the purpose of the statute is to deny the channels of interstate commerce to the operators of illegal wagering enterprises, casual violations of the statute such as the carrying by bettors in interstate commerce of notations of wagers placed with a bookmaker, or even the carrying of sweepstakes *tickets* by persons traveling in interstate commerce, are not covered by the statute.

Cases involving carriage of New Hampshire Sweepstakes acknowledgements are unique and require special evidence before the Government can claim a violation of the 1961 Racketeering Laws, because there can be no presumption of the operation of an illegal wagering enterprise merely from possession of acknowledgements of an act of gambling which occurred lawfully in the State of New Hampshire. The Government, in its brief, recognizes the limited purpose of Section 1953 and now claims a right under this indictment to prove that appellee was engaged in the business of purchasing sweepstakes tickets for a fee. No such claim was made below. No reference to a business or a continuing course of conduct is contained either in the indictment or in the Government's bill of particulars. The indictment does not charge a crime because it omits an essential element necessary to prove a crime under 18 U.S.C. 1953, viz., that the appellee was engaged in an illegal wagering enterprise.

The statutory history of 18 U.S.C. 1953 must be read against the background of the entire anti-crime program enacted by the 87th Congress at the behest of Attorney General Robert Kennedy. Mr. Kennedy's purpose was to attack organized crime by cutting off its access to the huge sums of money involved in illicit gambling. In responding to General Kennedy's request, the Congress insured the protection of innocent citizens and social bettors by amending the original bills to permit those gambling activities which are lawful in the various States and which do not aid the nefarious activities of the racketeers.

The New Hampshire Sweepstakes Program by its very statutory nature is not and cannot be made a part of the activities of organized crime in the United States.

ARGUMENT

A. THE ATTORNEY GENERAL'S ANTI-CRIME PROGRAM OF 1961 APPLIES ONLY TO ILLEGAL WAGERING ENTERPRISES

Section 1953, 18 U.S.C., applies only in cases involving illegal wagering enterprises. Section 1953 was enacted as part of an overall revision of federal legislation pertaining to racketeering in 1961 by the 87th Congress. The legislation was considered by the United States Senate under the title "The Attorney General's Program to Curb Organized Crime and Racketeering", and by the House of Representatives under the caption "Legislation Relating to Organized Crime".[15] The Attorney General

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[15] See *Hearings Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pp. 1-329, and *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., pp. 1-388. The Senate Bills were designated S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658 and S. 1665. The House Bills, which included some in addition to the Attorney General's bills, were H.R. 648, H.R. 1246,

himself testified at great length before both the Senate and the House Committees.[16] Mr. Kennedy stated the purpose and scope of the legislation succinctly: "Our package of bills is designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today."[17]

After stating, "I now would like to discuss these bills in some general terms," Mr. Kennedy made the following comments to illustrate his contention that action was necessary to curb illegal gambling enterprises.

> "Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling."[18]
>
> "It is quite evident that modern, organized, commercial gambling operations are so completely intertwined with the Nation's communications systems that denial of their use to the gambling fraternity would be a mortal blow to their operations."[19]
>
> "The word 'organized' is quoted because it should be clear that the Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities."[20]
>
> "Another area of gambling which needs attention, if we are to make a coordinated and successful attack on or-

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H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039.

[16] *Senate Hearings*, pp. 1-18. *House Hearings*, pp. 18-47.

[17] *House Hearings*, p. 20. *Senate Hearings*, p. 2.

[18] *House Hearings*, p. 20.

[19] *House Hearings*, p. 25, referring to H.R. 7039 (now 18 U.S.C. 1084).

[20] *House Hearings*, p. 26, *re* H.R. 7039.

ganized crime, is the easy interstate transportation of wagering paraphernalia. . . . That problem is the subject of H.R. 6571."[21] (H.R. 6571 as amended became 18 U.S.C. 1953 under which this indictment is brought).

Mr. Kennedy also placed in the record a statement from J. Edgar Hoover, of the FBI, which referred to the Attorney General's "Legislative Program as to Interstate Crime" and recommended the legislation as designed to provide "effective weapons in stamping out the evil of organized crime" so that the Government could proceed "against the well-entrenched interstate racketeers."[22]

In the Senate, Mr. Kennedy testified:

"But rather than repeat that testimony, I would like today to discuss the thinking of the Department of Justice with respect to the overall effect of our proposals. The danger which faces our country today from organized crime is acute. . . . The need for action is clear and the question is what should be done and what can be done effectively to control these hoodlums and racketeers who have become so rich and so powerful. . . .

"Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary sources of the funds which finance organized crime, all throughout the country.

"It is very important that everyone realize that the Federal Government has a responsibility to use its interstate power or its taxing power to move against organized crime. . . .

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[21] *House Hearings*, p. 29.

[22] *House Hearings*, pp. 31-32.

"I wish to emphasize, Mr. Chairman, that we do not seek to preempt the field of enforcement or interfere in any way with the traditional responsibilities of local law enforcement. . . .

"We would be shirking our responsibility to Congress if we did not come before you and point out that there are three specific areas which Congress can deny to organized crime. These areas are interstate travel, interstate commerce, and interstate communication. As I pointed out, they are a vitally necessary part of organized crime. Deny organized crime the use of interstate communications and free movement in interstate travel and interstate commerce, and you strike a heavy blow for law and order. The Congress can do this.

"The bills which we have proposed are (1) . . ., (2) . . ., (3) S. 1657, (4) . . ., (5) . . ., (6) . . ., (7) . . . .

"As I have said, . . . the gamblers need paraphernalia and equipment to conduct their businesses. They are organized on an interstate basis. They need rapid communications. They need the facilities of interstate travel."[23]

Referring to S. 1653 (now 18 U.S.C. 1952), the Attorney General said:

"Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. . . .

"The target clearly is organized crime. . . . Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise."[24]

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[23] *Senate Hearings*, pp. 11-12.

[24] *Senate Hearings*, pp. 15-16.

Referring to his entire package of legislation, the Attorney General said:

> "These bills carefully limit the activities of the Federal Government to the most important and the most dangerous problems now facing law enforcement. . . .
>
> *"American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills. The only toes tread on here are those of the racketeers and hoodlums".*[25]

In view of this history of the purpose of these bills, the State of New Hampshire cannot help but be offended. The only continuous course of conduct involved here, the only gambling enterprise at which the federal finger points, is the New Hampshire Sweepstakes Program.

B. CONGRESS WAS CAREFUL TO PROTECT INNOCENT CITIZENS AND EXEMPT LAWFUL STATE GAMBLING

There are two social theories underlying legislation about gambling. One is that gambling is evil *per se* and should be prohibited. Peterson, "A Look at Legalized Gambling", *Christian Century,* May 26, 1965. The other is that gambling itself is neutral from a moral point of view, but can become bad when control of gambling falls into the hands of racketeers. Murtagh, "Gambling and Police Corruption", *Atlantic Monthly,* November 1960; Kennedy, "The Baleful Influence of Gambling", *Atlantic Monthly,* April 1962. All federal gambling legislation recognizes that gambling is morally neutral and that the States may lawfully permit gambling within their own borders. The New Hampshire Sweepstakes Program confines the act of gambling entirely within the borders of New Hampshire.

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[25] *Senate Hearings,* p. 17. (Emphasis added.)

In enacting the 1961 anti-crime program, Congress was even more solicitous than was the Attorney General to protect the rights of ordinary American citizens and to confine this legislation to racketeers and hoodlums.

The three major bills dealing directly with gambling were H.R. 6571 (S.1657, now 18 U.S.C. 1953), H.R. 7039 (S.1656, now 18 U.S.C. 1084),[26] and S.1658 (now 15 U.S.C. 1171-1172).

Not one of these original bills granted any exception or exemption for lawful State operations in the nature of gambling. Congress amended every one of these measures to exempt all known State-legalized gambling existing at the time.

S. 1658 (15 U.S.C. 1172) was amended to exempt betting machines shipped to States or subdivisions of States where gambling establishments were licensed under State law, and furthermore, the States were authorized to enact statutes exempting themselves from the prohibition against shipping gambling machines in interstate commerce. See 107 Cong. Rec. 13945, and Historical Note 15 U.S.C.A. 1172, p. 243. It should also be noted that these amendments exempting certain States *liberalized* the pre-existing statute which had been on the books for ten years.

S. 1656 (H.R. 7039) was proposed as an addition to 18 U.S.C., Ch. 50, "Gambling". In its original form as drafted by the Department of Justice, the bill provided severe criminal penalties for furnishing or maintaining a wire facility or using such a facility to transmit bets or wagers interstate. Both the wire services and the customers were covered.[27] Congress exempted the wire services entirely. They confined the statute

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[26] *House Hearings*, p. 18.

[27] *House Hearings*, p. 18.

to those "engaged in the business of betting or wagering", thus exempting the social bettor entirely. And the Congress also excluded the transmission of wagering information "from a state where betting on that sporting event or contest is legal, into a state in which such betting is legal." (See 18 U.S.C. 1084, H. Rep. No. 967 and S. Rep. No. 588, 87th Congress, 1st Sess.)

H.R. 6571 (now 18 U.S.C. 1953, the basis for this indictment) was amended by the Judiciary Committee of the Senate to exempt pari-mutuel betting equipment, pari-mutuel tickets where legally acquired, or pari-mutuel materials used or designed for use where betting is legal under applicable State law. It was further amended on the floor of the Senate by the addition of an exemption for the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a state in which such betting is legal under the statutes of that state. See 107 Cong. Rec. 13902.

On the floor of the House, after praising the purpose to deny financial help to the "octopuslike activities of the commercialized racketeers", Congressman Cahill justifiably concluded in speaking about S. 1657 (now Section 1953):

> "There are sufficient exemptions in the bill, I think, to permit those activities which are legal in the States and protection has been extended to those activities which are not designed to aid in the nefarious activities of the racketeers of the country." (107 Cong. Rec. 16538).[28]

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[28] S. 1657 (now Section 1953) was described by Congressman McCulloch as follows: "S. 1657 will make it unlawful to transport in interstate commerce the paraphernalia and material which is used by professional bookmakers and numbers men. There is a special exemption for pari-mutuel betting equipment and betting materials transported into states in which the use of such materials is legal. The coverage of this

To which Attorney General Kennedy could say "Amen", since that was all he had requested.[29]

All of this legislative history is essential to determine the meaning of 18 U.S.C. 1953. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437. "Not every person or act which falls within the literal sweep of the language [of a criminal statute] necessarily comes within its intent and purpose. That language must be read and applied in the light of the evils which gave rise to the statute and the aims which the proponents sought to achieve. When that is done, the inapplicability of the act to the facts set forth in the indictment becomes clear." *United States* v. *Carbone*, 327 U.S. 633, 637.

In a case involving indictments under other aspects of the Attorney General's anti-crime program of 1961 (18 U.S.C. 1084 and 1952), it has been determined that the statutes require interpretation by the use of legislative history, and that the history plainly establishes an intent to prohibit interstate travel in aid of racketeering enterprises. See *United States* v. *Bergland*, 318 F. 2d 159 (C.A. 7), *cert. denied*, 375 U.S. 861.

"The interpretive process would be abused and the legislative will subverted were we to deal with the broad language of this statute in disregard of the narrow problem . . . which Congress sought to remedy." *Carbone, supra* at 641-2.

C. ANALYSIS OF SECTION 1953 SHOWS THAT IT APPLIES ONLY TO ILLEGAL WAGERING ENTERPRISES

Appellant's analysis of Section 1953 is erroneous. It ignores the overriding and dominant purpose of all the 1961 legisla-

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bill is directed at the shipment in interstate commerce of material which will be used to violate state and local law." 107 Cong. Rec. 16538.

[29] *Senate Hearings*, p. 13.

tion stemming from the Attorney General's program to cover only illegal gambling enterprises. What is more, the appellant's analysis misconstrues the meaning of the words used in the section.

The indictment in this case and the appellant's brief both treat Section 1953 as though it were an amendment to 18 U.S.C. 1301. The Government's Brief suggests that "the purpose of the bill was to extend the long-established prohibition against interstate transportation of lottery tickets to all gambling papers adapted for use in connection with a lottery or sporting event" (p. 13). It also urges that Section 1953 "is designed to close the most important loophole resulting from" certain decisions of this Court (p. 17). Neither of these suggestions is sound. Section 1301 was the by-product of the infamous Louisiana Lottery which was privately operated under a license from the State of Louisiana but which flooded the nation with hundreds of thousands of lottery tickets. There were drawings every month and tickets were sold in offices in almost every State as the operators openly flaunted the laws of other States. The proprietors became the dominant factor in the political life of Louisiana and the operation was so huge that by 1890, 45 percent of all the business of the New Orleans Post Office concerned the lottery.[30]

Nevertheless, despite the national outcry over the abuses of the Louisiana Lottery, Congressional action did not go beyond the specific evil to be corrected and the courts, in construing the 1895 statute, have recognized its limitations. Section 1301 merely prohibits carriage in interstate commerce of "any paper or instrument purporting to be or represent a ticket, chance, share or interest in a lottery." Whatever deficiencies existed

[30] Ezell, *Fortune's Merry Wheel*, 249-259 (1960).

in Section 1301 before Section 1953 was enacted are still there. But neither is the admitted purpose of Section 1301 to cover state licensed lotteries imported into the purpose of Section 1953. The two statutes are simply aimed at different evils; Section 1953 does not amend or replace Section 1301.

This is demonstrated most simply by the fact that Section 1953 is part of an entirely different chapter of the Code. Section 1301 is part of a special chapter dealing only with "Lotteries". (18 U.S.C., Ch. 61). Section 1953 is part of a special chapter dealing only with "Racketeering". (18 U.S.C., Ch. 95).

This is consonant with the entire background of the Attorney General's anti-crime program. It is also the only conclusion consistent with a careful analysis of Section 1953 itself.

H.R. 6571 (S. 1657) was not the original bill which the Department of Justice introduced on this subject. Attorney General Rogers had sponsored a bill designated H.R. 3246 (printed at p. 8, *House Hearings*) and S. 527. The generic concept of "wagering paraphernalia" as equipment and supplies to carry on an illegal gambling enterprise was not altered by the additional words used to describe the kinds of materials within the statutory idea of "paraphernalia". H.R. 3246 merely proscribed interstate carriage of "any records or paraphernalia" used in bookmaking, wagering pools and the numbers racket. This necessarily implied that the offensive materials were part of a gambling enterprise of the three listed types, and that such enterprise be part of a continuing, illegal course of conduct.[31]

Assistant Attorney General Miller (on whose Senate testimony appellant relies in its Brief, p. 11) was much more illuminating before the House Subcommittee:

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[31] *Senate Hearings*, pp. 289-291.

"The next bill that I would like the subcommittee to consider is H.R. 6571, which proscribes the interstate transportation of wagering paraphernalia.

"This bill is one aspect of the Department's intensive attack on organized gambling, which supplies the bankroll for all the other multi-state criminal activities which tax the American people to the tune of $22 billion a year. Our records indicate that the three most prevalent types of gambling involve bookmaking, wagering pools on sporting events, and the so-called numbers racket. H.R. 6571 is directed specifically at the interstate transmission of various kinds of paraphernalia used in these three forms of gambling. . . .

"H.R. 6571 applies to—

any records, paraphernalia, ticket, certificate, bill, slip, token, paper, writing or other devise used, or to be used, or adapted, devised, or designed for use—

in these three enumerated areas of gambling. Such all-inclusive language is necessary in an attempt to cover all of the equipment or paraphernalia which will inevitably be devised by organized racketeers in an effort to avoid the sanctions of this bill. In addition, the restrictive judicial interpretations which vitiated the Anti-Lottery Act at an early date suggest that the bill should be broadly drafted in order to declare the legislative goal with sufficiently inclusive language."[32]

In short, Mr. Miller frankly stated they were only aiming at multi-state criminal activities and that the breadth of language was chosen because of their experience with the Anti-Lottery law (Section 1301), not because Section 1953 was intended

[32] *House Hearings*, pp. 350-351.

to reach the type of activity proscribed by Section 1301. What Section 1953 was designed to do was to shut off the supply of wagering paraphernalia which was being shipped into various states for the conduct of the specified types of wagering enterprises. By expanding the description of the proscribed articles, the bill did not intend to abandon the concept of prohibiting acquisition of equipment and supplies by gambling enterprises. The addition of the words "ticket, certificate, bill, slip, token, paper, writing or other device" simply obviated the possibility that the statute would cover only "equipment" (the dictionary meaning of "paraphernalia")[33] and insured that supplies also would be prohibited.

The acknowledgements of purchase of New Hampshire Sweepstakes tickets may fall within the descriptive language of Section 1953, but once they pass into the hands of a purchaser, they are no longer part of the wagering enterprise. They need not be surrendered to claim a prize because the basis for payment in New Hampshire is the name and address on the ticket retained by the Sweepstakes Commission. In the hands of the purchaser, the acknowledgements are no part of the supplies or equipment by which the lottery is conducted. Therefore, they are not statutory "paraphernalia" within the meaning of Section 1953.[34]

The Government recognizes this limitation explicitly in its instructions to U. S. Attorneys concerning administration of the statute:

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[33] Webster's Third New International Dictionary, (1964).

[34] Cf. *United States* v. *Baker*, 241 F. Supp. 272 (M. D. Pa. 1965), *aff'd*, Nos. 15572 and 15573, C. A. 3, decided July 28, 1966, where the shipments involved 30,000 books of sweepstakes tickets, constituting a substantial quantity of the materials necessary for the operation of a lottery.

"... It will be seen from the analysis below that Section 1953 specifically avoids these restrictive interpretations and is made to relate to wagering paraphernalia which is used or to be used, or adapted, or devised, or designed for use in certain wagering activity. In view of this it is anticipated that there will be reports of casual violations of the statute, such as the carrying by bettors in interstate transportation of notations of wagers placed with a bookmaker or the carrying of sweepstakes tickets by persons travelling in interstate commerce. Inasmuch as the purpose of this statute is to deny the channels of interstate commerce to the operators of illegal wagering enterprises, prosecution of the casual violator of this statute, except under the most exceptional circumstances, would serve neither the ends of justice nor the specific objective of the statute. Accordingly, investigative and prosecutive emphasis will be placed on the operators of wagering enterprises, their employees and their suppliers."[35]

The appellee here is neither an operator, an employee nor a supplier of the New Hampshire Sweepstakes. Carriage by him of acknowledgements did not constitute any part of the New Hampshire Sweepstakes. The Sweepstakes takes place entirely within the State of New Hampshire and nothing the purchasers of New Hampshire Sweepstakes tickets do with their acknowledgements furthers the enterprise in any way.

The Government apparently recognizes the force of this argument, for they now impliedly admit that they must show that appellee was engaged in the business of operating an interstate gambling business of his own by undertaking to pur-

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[35] Bulletin of Instructions to U.S. Attorneys, distributed by the Department of Justice.

chase tickets in New Hampshire for a fee.[36] It is at least doubtful that such conduct would constitute conduct of a wagering enterprise rather than the rendering of a service.[37] But this question need not be decided since that was not what appellee was indicted for.

Appellant also recognizes that it must prove not only that the papers transported were within the language of Section 1953, but also that their interstate carriage facilitated illicit wagering.[38] But no such allegation appears either in the indictment or the Bill of Particulars below. It is necessary to charge in the indictment that which must be proved to convict. "A court cannot permit a defendant to be tried on charges that are not made in the indictment against him". *Stirone* v. *United States*, 361 U.S. 212, 217. Cf. *Russell* v. *United States*, 369 U.S. 749, 764: "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."

D. THERE IS NO PURPOSE HERE TO ASSIST THE STATES IN THE ENFORCEMENT OF THEIR CRIMINAL LAWS.

The Government admits that it is lawful for anyone to travel to New Hampshire to purchase sweepstakes tickets. There is no charge here that appellee violated the laws of New York by purchasing New Hampshire Sweepstakes tickets or by possessing the acknowledgements of purchase in New York. The indictment charges that the mere carriage in interstate commerce of the acknowledgements of purchase constituted a violation of 18 U.S.C. 1953.

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[36] Brief for the United States, pp. 18-19.

[37] See *State* v. *Kachadoorian*, 104 N. H. 29, 177 A. 2d 398.

[38] Brief for the United States, p. 16.

Public Law 87-218 (18 U.S.C. 1953) states a dual purpose: "To provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws." Though no such claim was made below, the Government now seeks to bolster its position by arguing a potential violation of New York law. (Brief, p. 19). The argument will not stand analysis.

The New York lottery statute (N.Y. Penal Law §1373) is modeled after 18 U.S.C. 1301. It prohibits the sale or transfer of "any paper, certificate, or instrument, purporting to be or to represent a ticket, chance, share or interest . . ." in a lottery. These are the identical words of Section 1301 which were interpreted in *France* v. *United States*, 164 U.S. 676, and *Francis* v. *United States*, 188 U.S. 375, to apply only to papers which could be exchanged for a prize. Under familiar principles of statutory construction, the cases of this Court would be persuasive where, as here, there are no New York cases. No violation of New York law is involved.[39]

As a matter of comity and in order to assist other States in the administration of their own laws, the New Hampshire Sweepstakes Commission furnished to the Attorneys General of all northeastern States, on April 11, 1964, a copy of the New Hampshire Statute and a digest of the administrative rulings setting up the New Hampshire Sweepstakes Program.[40] In view of the impending referendum to authorize a sweepstakes program in New York,[41] it is not surprising that the Attorney

[39] See 50 AM. JUR. *Statutes* §458-462, and New York Penal Law (Annotated) §1373.

[40] Letter with enclosures to Attorneys General of Maine, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Delaware, dated April 11, 1964.

[41] N. Y. Times, Sept. 14, 1966, p. 1, col. 1 (City ed.).

General of New York has made no official ruling governing application of New York law to the New Hampshire acknowledgements of purchase. In Massachusetts (whose residents purchase more tickets than those of any other State).[42] Attorney General Brooke has ruled that possession of New Hampshire Sweepstakes acknowledgements by Massachusetts citizens violates no Massachusetts law.[43] Only if a professional gambler or bookmaker engages in the business of registering "such wagers" is the law of the Commonwealth violated.[44]

This Massachusetts ruling is consistent with the purpose of

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[42] Consolidated figures for the entire three years of the New Hampshire Sweepstakes operation show the following distribution of prize winners: Massachusetts—28%; New Hampshire—17%; New York—16%; New Jersey—10%. Remaining 29% divided among 41 States, 7 foreign countries, and the District of Columbia. This analysis is wholly predictable on the basis of normal New Hampshire commercial and tourist travel. News Release, New Hampshire Sweepstakes Commission, September 22, 1966.

[43] Opinion of Attorney General to Honorable Robert W. MacDonald, Commissioner of Public Safety, dated September 9, 1964, to be published in Commonwealth of Massachusetts Public Document No. 12, *Report of Attorney General for Year Ending June 30, 1965.*

[44] One of the questions asked of Attorney General Brooke was whether purchasing numerous New Hampshire Sweepstakes tickets for others and bringing back the acknowledgments violated Massachusetts law. The ruling states: "Therefore, section 17 does not apply to the casual arrangement by which an individual may volunteer to purchase a chance on the Sweepstakes for a friend. It can be invoked, however, against a professional gambler who sets up a place of business or has records and apparatus in his possession which enable him to deal in and profit by such transactions. Should the activity referred to in question #4 be carried on by persons with the type of apparatus, records and place of business specified in section 17, such activity will constitute a criminal offense under the statute." *Id.*

all modern gambling legislation, including the federal statutes and the law of New Hampshire.

The Government's contention [45] that appellee's alleged activities would now be a violation of New Hampshire law is erroneous. Like the federal law on which the Government relies, the New Hampshire Sweepstakes statute prohibits unauthorized persons from engaging in the *business* of purchasing or offering to purchase sweepstakes tickets for others for a fee or service charge.[46] It does not prohibit the casual purchase of tickets for others, even if a fee is charged. It requires proof of a continuing course of conduct in order to bring the activity within the prohibition of the New Hampshire statute. This amendment to the original New Hampshire Sweepstakes law was patterned on the federal legislation of which Section 1953 is a part. The objective was exactly the same—to reach persons making a business of operating illegal wagering enterprises or conducting organized illegal activity.

Under N. H. Rev. Stat. Ann. 284:21-h, only two sweepstakes races per year may be held, both within the State of New Hampshire. This is hardly attractive to the gamblers who are running daily numbers, policy and bolita drawings. It is commercially impossible for racketeers to set up a wagering enter-

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[45] Brief for the United States, p. 19.

[46] N. H. Rev. Stat. Ann. 284:21-O, Purchase of Tickets for a Fee Prohibited. No person shall engage in the business of purchasing or offering to purchase a sweepstakes ticket or tickets for, in behalf of, or in the name of another for a fee or service charge which shall make the ultimate cost of such ticket or tickets to the registered owner thereof greater than the legal price of such ticket or tickets as established by the sweepstakes commission under the authority of this subdivision. Whoever violates the provisions of this section shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.

prise in other States which would traffic in New Hampshire Sweepstakes tickets. The tickets must be purchased within the State of New Hampshire. Three dollars must be paid for each one. A name and address must be obtained in advance for each ticket. The State of New Hampshire keeps the entire profit after prizes and administrative costs. The most that an organized business could hope to gross would be fifty cents to one dollar per ticket, and this would hardly cover the cost of the service rendered.

The instant case illustrates the realities of the situation. It is 600 miles round trip between Elmira, New York and Keene, New Hampshire. A payment of one dollar for each ticket purchased would produce gross income insufficient to cover the time involved plus the cost of travel. No such illegal gambling enterprise can exist. The nemesis would be the laws of economics, not 18 U.S.C. 1953.

CONCLUSION

For the foregoing reasons, we respectfully submit that this court should affirm the judgment below that the activity charged in the indictment does not come within the purpose of 18 U.S.C. 1953.

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SEPTEMBER 1966.

OCT 6 1966
JOHN F. DAVIS, CLERK

No. 47.

IN THE

Supreme Court of the United States

October Term, 1966.

UNITED STATES OF AMERICA,
Appellant,

v.

ANTHONY L. FABRIZIO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—865-4181—1966

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No. 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

UNITED STATES OF AMERICA,

Appellant,

v.

ANTHONY L. FABRIZIO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

Opinion Below.

The order of the district court dismissing the indictment (R. 10) is not reported.

Jurisdiction.

The order of the district court was entered on October 5, 1965 (R. 10). The notice of appeal was filed on November 4, 1965 (R. 11-12), and this Court noted probable jurisdiction on February 21, 1966 (R. 13; 383 U.S. 904). The jurisdiction of this Court rests on 18 U.S.C. 3731.

Statute Involved.

18 U.S.C. 1953 provides as follows:

> §1953. Interstate transportation of wagering paraphernalia
>
> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. * * *

Question Presented.

Whether the mere carriage in interstate commerce from New Hampshire to New York of 75 "acknowledgments of purchase" of the New Hampshire Sweepstakes, an event conducted by the State of New Hampshire to raise revenue for educational purposes, charges a crime under 18 U.S.C. Section 1953?

Statement.

On September 3, 1964, an indictment was returned in the United States District Court for the Western District of New York alleging that appellee knowingly carried in interstate commerce from New Hampshire to New York "records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire * * *" (R. 3). On September 24, 1964, in response to a motion by appellee, the United States filed a bill of particulars, stating that "1. It is claimed by the United States that defendant knowingly carried in interstate commerce in violation of Section 1953, T. 18, United States Code, 75 written acknowledgements of purchase of State of New Hampshire First Sweepstakes Race of September, 1964; 2. It is not charged by the United States that the defendant violated any State law, ordinances or rules. The United States charges that the defendant violated §1953, Title 18, United States Code" (R. 5).

On October 12, 1964, appellee moved to dismiss the indictment on the ground that the indictment on its face and together with the bill of particulars did not state facts sufficient to constitute an offense (R. 4). The grounds for the motion were set forth in a supporting affidavit of one of appellee's attorneys (R. 6-9). While admitting that appellee carried the sweepstakes acknowledgments as charged, the affidavit relying on the legislative history of Section 1953, argued that the appellee's conduct did not fall within the purview of the statute.

On October 5, 1965, the district court dismissed the indictment. Citing House Report No. 968, 87th Cong., 1st Sess., the court stated that "[t]he charge in the indict-

ment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act" (R. 10).

Summary of Argument.

This case presents a problem of construction of a penal statute, 18 U.S.C. Section 1953. That statute was enacted along with other similar penal statutes to constitute a unified federal legislative attack on the use of interstate commerce by organized racketeers to further their illegal business enterprises of gambling, narcotics, prostitution, and liquor. Appellee has been indicted under Section 1953 for the carriage in interstate commerce from New Hampshire to New York of 75 "acknowledgments of purchase" of the New Hampshire Sweepstakes, an event conducted by the State of New Hampshire to raise revenue for educational purposes. The problem of construction turns on an interpretation of the phrase "wagering pool with respect to a sporting event" in Section 1953(a)(b) so as to apply it to the New Hampshire event.

Appellee contends that the indictment does not charge an offense within the purview of Section 1953. A reading of Section 1953(a) shows it applies to a class of commonly recognized forms of illegal gambling associated only with the gambling enterprises of organized racketeering. Section 1953(b) exempts newspapers and all forms of state permitted gambling existing at the time of the passage of this Act. The basic design of Section 1953 is repeated in the companion measures of the program which, read together, demonstrate a consistent pattern of application solely to the illegal business enterprises of organized crime. Other varieties of gambling, legal or illegal, are not touched by this program.

These conclusions drawn from a reading of Section 1953 and its companion measures are made patent by

their legislative history. That history shows that Congressional interest centered wholly on the problem of reaching the activities of organized racketeering enterprises. The legislative history of the program also evinces an equally strong concurrent intent not to legislate concerning other gambling activities legal or illegal.

The interpretation of Section 1953 urged by appellee would not destroy the efficacy of the statute since this indictment presents the rare case where the underlying wagering activity alleged is a legal state conducted event, conclusively rebutting any inference of the kind of illegal activity intended to be prohibited by the statute. Appellee does not argue that the paraphernalia of the New Hampshire event can never underlie a Section 1953 prosecution, but that where New Hampshire acknowledgments are alleged to be the gambling paraphernalia, wagering conduct within the ambit of the statute, other than the New Hampshire event, must be shown.

The interpretation of Section 1953 urged by appellant would destroy the legislative assumptions on which this statute and its companion measures were constructed, thereby allowing these statutes to serve as a vehicle for imposing a federal anti-gambling policy on the states—the very result Congress wished to avoid. The ramifications of such a federal anti-gambling policy would be seriously disruptive of federal-state relations.

In addition, such an interpretation would be unforeseeable in light of the well understood and commonly accepted connotation of the underlying gambling activities enumerated in Section 1953(a). Absurd results would follow, subjecting numbers of would-be law abiding citizens to the same severe criminal penalties intended for organized racketeers. Because the application of Section 1953 to the New Hampshire Sweepstakes is unexpected, the statute so applied, would be void for vagueness as violative of procedural due process.

There is a further issue of criminal procedure presented by appellant's argument of new facts alleging additional conduct on the part of appellee. Since these allegations are neither alleged nor provable under this indictment, they are not before this Court on this appeal. *A fortiori,* this is so where the bill of particulars precludes appellant from asserting these facts.

ARGUMENT.

I. An indictment alleging that appellee carried 75 acknowledgments of the New Hampshire sweepstakes, an event conducted by the State of New Hampshire to raise revenue for educational purposes, from New Hampshire to New York, does not charge a crime under 18 U.S.C., Section 1953, because such conduct is not within its purview.

A. Introduction.

a. The Historical Context of 18 U.S.C. Section 1953 and the Legislative Solution.

18 U.S.C. Section 1953 was enacted into law by the 87th Congress on September 13, 1961. It was one of a series of bills which were designed to form a unified federal statutory attack on organized racketeering, a problem which had increasingly phased federal, state, and local officials. The well known Kefauver crime hearings of 1950 and 1951 brought to national attention the vast scope and power of racketeers who carried on their illegal activities throughout the United States on a highly organized, interstate basis.[1] These hearings and the federal and state crime investigations which followed constituted the

[1] Hearings Before a Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Cong., 2nd Sess. 1950, 1951.

evidential background for the Congressional hearings of 1961 which resulted in the passage of Section 1953[2].

The hearings pinpointed illegal gambling, prostitution, and narcotics as the principal business activities of organized criminals of which illegal gambling was found to be the most pervasive and profitable (Appendix B, ¶¶ 5, 6, 11, 19). Interstate channels of communication and movement were shown to be vital to these organized racketeers not only as essential to the efficient operation of their illegal activities which typically spanned state lines, but also as a means of evading state prosecution (Appendix B, ¶¶ 1, 2, 3, 10, 12).

The objective of Section 1953 and its companion measures was to close interstate channels whenever their use is in furtherance of the underlying illegal gambling or other illegal activity identified by the legislative evidence as the bailiwick of organized racketeering (Appendix B, ¶¶ 4, 5, 7, 9, 13).

b. New Hampshire Sweepstakes and its operation.

The New Hampshire Sweepstakes was not in existence in 1961 when 18 U.S.C. Section 1953 and its companion measures were enacted. In fact, at the time Section 1953 and the related statutes were under consideration in Congress, no state sponsored or authorized lottery had been in operation in the United States since 1894, the year in which the lottery conducted under a franchise of the State of Louisiana, ceased its operations.[3]

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[2] *Legislation Relating to Organized Crime*, Hearings, Subcommittee No. 5, House Committee on The Judiciary, 87th Cong., 1st Sess. on R. H. 468, H. R. 1246, H. R. 3021, H. R. 3022, H. R. 3023, H. R. 3246, H. R. 5230, H. R. 6571, H. R. 6572, H. R. 6909, H. R. 7039; *The Attorney General's Program to Curb Organized Crime and Racketeering*, Hearings, Senate Committee on the Judiciary, 87th Cong., 1st Sess. on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665.

[3] Ezell, Fortune's Merry Wheel p. 267 (1960).

The New Hampshire Sweepstakes, which was authorized by the New Hampshire legislature on April 30, 1963, is a lottery event instituted to raise revenue for educational purposes. The unique characteristic of the New Hampshire Sweepstakes is that it is conducted entirely by the State of New Hampshire through an agency of the State of New Hampshire, the New Hampshire Sweepstakes Commission.[4]

According to New Hampshire statutes, the purchase of a chance on the New Hampshire Sweepstakes must take place entirely within the State of New Hampshire, and may be purchased only at State authorized and controlled locations.[5] Persons licensed by the State of New Hampshire sell tickets from a specifically designed machine. This machine ejects an "acknowledgment of purchase" which is a duplicate of the ticket remaining in the machine. The ticket is retained in the possession of the State of New Hampshire.[6] The "acknowledgment" is merely evidence to the participant that his name has been recorded with the State of New Hampshire. It states on its face that it need not be presented in order to receive prize money, and is non-saleable and non-transferable (R. 9). Thus, the acknowledgment may be destroyed without affecting the participant's right to prize money.

Because of New Hampshire's unique attractions as a nationally favored vacation resort, a very large percentage of purchasers of sweepstakes acknowledgements are out-of-state residents (Appendix C).

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[4] N. H. Rev. Stat. Ann. 284: 21a (Supp. 1965).

[5] N. H. Rev. Stat. Ann. 284: 21h (Supp. 1965).

[6] The operation of the sweepstakes is described in New Hampshire Sweepstakes Commission, New Hampshire Sweepstakes Program, 1966 (Appendix D).

B. The inapplicability of Section 1953 to the conduct described in the indictment is shown not only by a reading of the statute on its face and *in pari-materia* with its companion measures, but also by a clearly expressed legislative intent.

a. The Ambit of the Statute on its Face.

The indictment charges appellee with the carriage in interstate commerce of 75 New Hampshire Sweepstakes acknowledgements, "to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire" (R. 3). Thus, the application of 18 U.S.C. Section 1953 to this charge rests upon interpreting the phrase "wagering pool with respect to a sporting event," so as to apply to a state conducted gambling event. Appellee submits a reading of Section 1953 shows the anomaly of that interpretation.

The phrase "wagering pool with respect to a sporting event" must be read in context with the other enumerated types of gambling grouped in Section 1953(a), subsections (a) and (c). These gambling activities, "bookmaking," "numbers," "policy," "bolita," are familiarly known to be the life blood of organized racketeering and therefore tainted with a special illegality. In the context of these easily recognized illegal gambling activities it is manifest that the phrase "wagering pool with respect to a sporting event does not refer to paraphernalia of the New Hampshire Sweepstakes, which has no similar connotation of illegality, being a wagering event conducted by a State. *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303.

A comparison of Section 1953(a) with Section 1953(b) strengthens the contention of appellee that there is no justification in a reading of Section 1953(a) which treats the phrase "wagering pool with respect to a sporting

event" in a totally different spirit than the other enumerated types of proscribed gambling conduct by expanding that phrase to include a legal sweepstakes activity which is conducted by a State.

The two parts of Section 1953 reflect a pointed legislative effort to distinguish between those activities enumerated in Section 1953(a) which are familiarly known to be conducted illegally by organized criminal elements and other gambling activities not associated with racketeering. Section 1953(b) exempts the major legal forms of gambling established at that time. Clause (1) completely exempts from the operation of the statute pari-mutuel betting equipment, pari-mutuel tickets where legally acquired, and pari-mutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable state law; clause (2) permits the transportation of betting materials to be used in betting on a sporting event into a state where such betting is legal;[7] and clause (3) exempts newspapers and similar publications.

Appellant urges that the specific exceptions of Section 1953(b) are necessarily the only exemptions which may be made to Section 1953(a), thereby seeking to expand the class of obviously illegal gambling in Section 1953(a) to include all other lotteries, legal or illegal, other than those enumerated in Section 1953(b). Appellant's analysis of the significance of these exemptions ignores the dissimilarity in kind between bookmaking, wagering pools,

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[7] The reason for limiting the exemption contained in Section 1953 (b) (2), to transportation of paraphernalia *into* a state where "wagering on sporting event is legal," is not because an exemption similar to that provided for pari-mutuel activity would undermine the gambling policies of the states, as the appellant claims (Brief of Appellant, pp. 8-9). The limiting exemption of 1953(b) (2) exists simply because only one state, Nevada, permits off-track betting, the paraphernalia of which may be used in bookmaking in other states. Thus a broad exemption such as that allowed for pari-mutuel material, would nullify one of the primary aims of the statute halting interstate shipment of the wagering paraphernalia of illegal bookmaking operations.

numbers, policy, bolita enumerated in Section 1953(a) and the legal State-sanctioned gambling activity and newspapers in Section 1953(b).

Appellee submits that Section 1953(b)(1), (b)(2), and (b)(3) should be read as merely expositive of exemptions inferable from a reading of Section 1953(a). This is supported by the fact that the exemptions in Section 1953(b) are unnecessary because they are reasonably inferable from an application of the rules that criminal statutes and statutes in derogation of sovereignty must be construed narrowly. *United States v. Boston & M. R. R.*, 380 U. S. 157; Sutherland, Statutory Construction, Sec. 6301 (3rd ed. 1943).

b. Section 1953 in Pari-Materia With Companion Statutes.

When Section 1953 is read together with the other statutes drafted in coordination with it, it reflects the common design of these statutes to close interstate channels of commerce only where its use is tied to the furtherance of an underlying illegal gambling or other racketeering activity, and a converse purpose not to reach non-racketeering associated activities and those gambling activities permitted by the States.

Whereas Section 1953 proscribes one specific use of interstate facilities, the interstate transportation of the gambling paraphernalia associated with racketeering gambling activities, Section 1952 (joined with Section 1953 under Chapter 95 of Title 18 of the United States Code, entitled, significantly, "Racketeering"), is conceptually a much broader statute. Section 1952 proscribes interstate travel, transportation or use of any interstate facility, in furtherance of unlawful business enterprises involving gambling, liquor, narcotics and prostitution, or, in execution of the crimes of extortion, bribery, or arson, violative

of state or federal law (Appendix A). The close relationship between the two statutes however is apparent from a reading of them, and it is evident that these two statutes are different approaches to a common problem.

18 U.S.C. Section 1084, the 3d prong of the attack, is still another approach to the same objective. This statute prohibits the transmission of wagering information through a wire communication facility by persons engaged in the business of betting or wagering. As in Section 1953(b), an exemption is made in Section 1084(b) for the transmission of wagering information for use in news reporting of sporting events, and, in addition, for the transmission of information for the placement of bets on sporting events from a state where such betting is legal into a state in which such betting is legal (Appendix A).

The Gambling Devices Act of 1962, another statute in the package, forbids the interstate transportation of gambling machines.[8] Here too, however, specific exemptions are made for those gambling devices used at licensed gambling establishments where betting is legal under applicable State law[9] and, a further exemption for any device manufactured for use at a pari-mutuel race track[10] (Appendix A).

While it is true that specific phrases of limitation, such as "engaged in the business of wagering" in Section 1084(a), and "unlawful activity" in Section 1952(b) are present in these statutes, it does not follow that their absence in Section 1953 is persuasive that this statute was singled out by Congress from all the other statutes in the "package" to apply to underlying legal as well as illegal conduct. Because the mere act of travel or mere use of a wire communication is a neutral act and cannot

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[8] P. L. 87-840 (1962), Amending Act of Jan. 2, 1951, Ch. 1194, §2, 15 U. S. C. 1172 (1964).

[9] *Ibid.*

[10] P. L. 87-840 (1962), Amending Act of Jan. 2, 1951, Ch. 1194, §9, 15 U. S. C. 1178 (1964).

convey the underlying illegal nature of the conduct which Section 1084 and Section 1952 were concerned with, words of limitation were necessary to accurately characterize the illegality of the underlying conduct the statute sought to reached. This is not true of Section 1953 where proof via the carriage of the kind of paraphernalia associated with bookmaking, wagering pools, numbers, policy and bolita, all known types of illegal racketeering gambling, sufficiently identifies the underlying illegality of the conduct aimed at. Another significant fact to explain the presence of words of limitation in Section 1952 and Section 1084 is the acute constitutional sensitivity of the areas of travel and wire communications which understandably involve a need for legislative caution.

c. Legislative History.

Legislative history brings into sharper focus the mean- of Section 1953 which can be drawn from a reasonable reading of the words of the statute and its companion statutes. The hearings on these bills and the debate concerning them show that the crucial legislative assumption underlying Section 1953(a) was that the enumerated gambling activities were sufficiently notorious to convey to all persons the particular illegal class of gambling paraphernalia which Congress intended to reach (Appendix B, ¶¶ 10, 14, 15, 16, 17, 24, 25, 26, 27, 32).

No legislative historical evidence can be found which lends even oblique support to the appellant's position that Congress intended Section 1953 to apply to the paraphernalia of all lotteries. Not only did Congress not intend Section 1953 to apply to all lotteries, it did not even intend it to apply to all illegal lotteries (Appendix B, ¶¶ 27, 28, 29, 43).

Their guide in the enumeration of prohibitions of Section 1953 was not the compendium of gambling, but

rather, the class of gambling which the evidence before Congress had singled out as the domain of organized racketeering gamblers (Appendix B, ¶¶ 14, 19, 20, 21, 24).[11] The line was clearly drawn between certain underlying illegal gambling conduct familiarly associated with the gambling ventures of organized racketeering, as opposed to gambling conduct lawful in the states, and other non-racketeering, albeit illegal, gambling (Appendix B, ¶¶ 27, 28, 29).

Nor were the exemptions of Section 1953(b) intended to constitute the sole exemptions from the coverage of Section 1953(a), the role which the appellant has ascribed to them (Brief for the Appellant, p. 8). Legislative evidence shows the exemptions of Section 1953(b) were intended, as is clear on the face of the statute, to serve a cautionary purpose by providing specific exemptions for certain conduct which was never conceptually within prohibitions of Section 1953(a). Section 1953(b)(1) and (2) were added as an expression of deep Congressional concern for the inviolability of state gambling policies, an overriding dominant theme of the Congressional hearings and debates[12] (Appendix B, ¶¶ 33, 34, 38, 40, 42).

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[11] Aware that 18 U. S. C. §1301 was wholly ineffective to halt the flow of gambling paraphernalia used in racketeering gambling, Congress decided to fashion a new statutory weapon with §1953 rather than "plug the loopholes" of the old statute, as appellant suggests (see Appendix B. ¶18). The difference in the scope of the statutes is apparent from a comparative reading of them. §1301 refers to lotteries without any further refinement in definition while §1953 does not contain any such generic term, but out of the myriad of forms of gambling selects five specific types of gambling games. The specific role of §1953 in the legislative "package" was to halt the interstate shipment of raw materials necessary to the carrying on of illegal racketeering gambling activities (Appendix B, ¶¶ 14, 15, 16, 18, 19).

[12] Rep. Fascell in reference to S. 1657: "This bill properly exempts from its provisions pari-mutuel betting equipment where legally acquired or pari-mutuel materials designed for use at racetracks in states where such betting is legal. I am pleased to note the care which has been exercised to recognize and preserve the validity of state laws covering pari-mutuel betting operation." 107 Cong. Rec. 16540.

The exemption of Section 1953(b)(3), for newspapers and similar material, reflected extreme legislative caution that the right of free speech should not be placed in even minimal jeopardy[13] (Appendix B, ¶37).

Furthermore, the clear policy of Congress was that Section 1953 and its companion statutes should not interfere with the traditional scope of local law enforcement. Congress did not propose by these statutes to dictate a federal anti-gambling policy to the States. On the contrary, it intended that local law enforcement should continue to bear the burden of enforcement of State gambling policies and further, that these gambling policies, whether for or against gambling should not be interfered with (Appendix B, ¶¶ 33, 34, 36, 38, 39).

Appellant urges the broadest interpretation whereby Section 1953 would apply not only to the illegal forms of the gambling activity enumerated in Section 1953(a) but all legal varieties of these games as well. The legislative history makes patent, however, that Congress "carved out" of the plethora of gambling activities extant only those forms of gambling which were predominantly racketeer-associated and did not intend to affect by force of Section 1953 other gambling conduct, although such gambling conduct may be illegal under State law (see Appendix B, ¶¶ 27, 28, 29, 43).

The appellant justifies a strict literal interpretation of Section 1953 so as to include the New Hampshire

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[13] An exchange between Senator Keating and Assistant Attorney General Miller:

> Mr. Miller: Now the newspapers involved are not used or designed to be used in any of these three prohibited types of gambling, and consequently I feel very strongly that it would not be included within the purview of this bill.
>
> Senator Keating: It is not an essential part, but I can conceive of how it could be used. Would it not be a wise precaution to make some exception? You certainly would have no objection if an exception were written in to cover newspapers in general circulation which were not expressly designed for the purpose of aiding gambling. Sen. H. 289.

event, by contending that the purpose of the statute was to prevent the undermining of the public policy of the State's anti-gambling laws (Brief for the Appellant, pp. 8-9). While it is true that a ramification of the organized interstate illegal gambling activity sought to be prohibited by Section 1953 is the undermining of State gambling laws, it is misleading to say that this undesirable ramification is the evil sought to be remedied so that all gambling which may undermine state gambling laws was intended to be prohibited. In other words, Congress did not wish to halt all interstate gambling conduct which may violate the laws of any one State, but only those interstate gambling activities which were racketeer-associated.

This Court in *U. S. v. Carbone*, 327 U. S. 633, has recognized the substantial differences in the illegalities of conduct sought to be reached and the conduct encompassed by a literal reading of the statute. In that case the Federal Kickback Act[14] was not extended to illegal conduct which was covered by its terms. The Court said: "Not every person or act falling within the literal sweep of the . . . [statute] necessarily comes within its intent and purpose. That language must be read and applied in light of the evil which gave rise to the statute and the aims which the proponents sought to achieve. When that is done the inapplicability of the Act to the facts set forth in the indictment becomes clear." 327 U. S. at 633.

This indictment presents the rare case where the principle of non-applicability elicited from a reading of the statute and its legislative history can be applied to the indictment on its face. Since the underlying wager-

[14] Federal Kickback Act, Act of June 13, 1934, 48 Stat. 948, 40 U. S. C. §276b (1964).

ing activity is a legal state conducted event, the possibility of its being the kind of underlying illegal wagering conduct intended to be reached by the Section 1953 is conclusively rebutted. This is not to say that the paraphernalia of the New Hampshire event can never support a Section 1953 prosecution, but that where New Hampshire acknowledgments are alleged to be the gambling paraphernalia, gambling conduct within the ambit of the statute, other than the New Hampshire event, must be shown.

The interpretation of Section 1953 by the District Court preserves the workable assumptions of the statute and its symmetry with the companion measures. *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303; *Boston and M. R. R.*, 380 U. S. 157.

II. Section 1953 should not be construed to apply to the New Hampshire event because to do so would be disruptive of federal-state relations, produce absurd results, and cast doubt on the constitutionality of the statute.

A. The Adverse Affect on Federal-State Relations.

The purpose of Section 1953 was to close the channels of interstate commerce to the shipment of paraphernalia of those racketeering-associated gambling activities enumerated in the statute. If there were no threat to state laws and law enforcement from multi-state operations of organized crime, federal entrance into the area of gambling law enforcement, a matter of traditional local con-

cern, would be unnecessary, unwarranted,[15] and specifically unintended by Congress.[16]

An interpretation of Section 1953 which ignores the crucial condition precedent which makes the statute operative, i. e., an underlying organized racketeering gambling activity, would be tantamount to imposing a federal anti-gambling policy on the states.[17] Such an interpretation should be avoided because of its serious adverse ramifications such as federal pre-emption of state laws; conflict

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[15] That carrying the evidence of a bet completed in a state where betting is legal into a state where placing the bet would be illegal was not intended to be reached by these statutes is shown by the testimony of Assistant Attorney General Miller in the House hearings.

> "Nevada, of course, is the best example . . . There it is legal. If that is the policy of the state to permit gambling that is a determination by that state that it is legal. Now, a man travelling in furtherance of that gambling activity, to say he takes the proceeds, and deposits them in a bank in New York, I can't conceive he falls within the prohibitions of this bill because there is no unlawful business he is furthering. "House Hearing, p. 343 on H. R. 6572. It should be noted that currency is considered wagering paraphernalia. *United States v. $1,058 in U. S. Currency*, 210 F. Supp. 45 (W. D. Pa. 1962)."

[16] This is evident not only from the total attention devoted to the problem of organized crime in the hearings, but also in the specific and frequent declarations by members of Congress expressing fear of pre-empting state laws (Appendix B, ¶¶ 38, 39) and fear of the Federal Government intruding in the area of enforcement properly matters of state and local concerns (Appendix B, ¶¶ 33, 34, 41, 42, 43). The legislative program shows unmistakable deference to every legal state permitted activity existing at the time of the passage of this legislation (Appendix B, ¶¶ 35, 36, 37, Appendix A).

[17] Congressional fear of this possibility is shown by the following statement of Sen. Eastland in debate:

> "Unfounded fears have blocked better progress in fighting the underworld. One of these fears is that a national police force may be established. Now I am as concerned about the dangers of a national police force as anyone, but it is apparent that we can go way beyond any of these measures before giving any substances to this specter. At present, the number of FBI agents is less than one-fourth the number of policemen in New York City alone, despite the nationwide obligations of this Federal agency. This bill may lead to an expansion in the manpower of the FBI but it definitely promises an even greater expansion of the protection of our Nation from the plundering of national crime syndicates. A successful fight against the underworld requires the cooperation of Federal, State, and local law enforcement agencies. This bill will make such cooperation more feasible than it has heretofore been. It assures a combined effort against all those in our midst who cross state lines in attempting to carry out their defiance of the law. 107 Cong. Rec. 13943."

with state gambling laws and policies;[18] heavy administrative burden on the federal enforcement and judicial agencies; and acute jurisdictional uncertainty.

In addition, such a maximum exercise of federal power in an area of minimal federal concern raises broad constitutional issues. Cf. *United States v. Kahringer*, 345 U. S. 34 (1953).

B. Absurd Results.

Where the words of a statute are so broad as to be applicable to widely disparate conduct, an examination of the consequences of a broad application serves as a meaningful indication of what conduct should be construed as within the ambit of the statute. *Church of the Holy Trinity v. United States*, 143 U. S. 457. It is well established that a statute should not be interpreted to per-

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[18] A federal anti-gambling policy would insure deep federal-state conflict (see Brief of the State of New Hampshire, as *amicus curiae*, p. 22). Prosecution of appellee under New York Law would be doubtful. N. Y. Penal Law §§ 1370-1386. See *Intercontinental Hotel v. Golden*, 15 N. Y. 2d 9, where the Court said:

> The legalization of pari-mutuel betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of "some prevalent conception of good morals or some deep rooted tradition of the commonwealth." *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, 202 (1918).
>
> . . .
>
> The trend in New York State demonstrates an acceptance of licensed gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in a community. Our newspapers quote the odds on horse races, football games, basketball games and print the names of the winners of the Irish Sweepstakes and the New Hampshire Lottery.
>
> Informed public sentiment in New York is only against unlicensed gambling, which is unsupervised, unregulated by law and which affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices. 15 N. Y. 2d at 15.

N. Y. Penal Law §975, as amended by L. 1960, Ch. 549, §4, is designed only to cover policy slips. Maximum punishment under New York lottery statutes is one year imprisonment except for N. Y. Penal Law §1372 which provides for two years imprisonment.

mit absurd results capable of causing grave public injury. *Church of the Holy Trinity v. United States, supra.*

Under the unrestricted literal interpretation of Section 1953 urged by appellant, thousands of non-residents who participate in an openly conducted popular wagering event in reliance on the aura of legality fostered by a state-conducted operation, would be exposed to federal criminal penalties under a statute colored with racketeering terms. They would be subject to the same severe punishment which was intended to inhibit organized criminals. A non-resident citizen who wagers on a state pari-mutuel race would incur no federal penal liability while one who wagers on a sweepstakes-style state conducted event would be a felon. (This inapt result is especially egregious in this case since the same race track in New Hampshire is used for both pari-mutuel and sweepstakes races (*New Hampshire Sweepstakes Program,* Appendix D). A New Hampshire citizen who purchases a sweepstakes "acknowledgment" and carries it on his person into another state while on unrelated business is also a felon.

These are but a few situations illustrative of the results of an application of Section 1953 to the mere carriage of New Hampshire acknowledgments in interstate commerce. They illustrate the danger of a literal interpretation of the words of the statute whereby numerous law-abiding citizens incur penal liability for engaging in innocuous conduct from which no evil intent may be inferred. *Jarecki v. G. D. Searle & Co.,* 367 U. S. 303.

This unreasonable application of Section 1953, urged by appellee, is manifestly at variance with Congressional intent. Where a penal statute imposing harsh criminal penalties is involved, the words should not be expanded beyond their letter and spirit. *United States v. American Trucking Corp.,* 310 U. S. 534.

C. Constitutional Issue of Vagueness.

A penal statute must give fair notice of the conduct intended to be proscribed. Otherwise persons who would be law-abiding are not given clear warning of the acts which incur penal liability. *Winters v. New York,* 333 U. S. 507; *Musser v. Utah,* 333 U. S. 95. Where a statute sets forth a group of words, all of which have a similar and commonly understood connotation, the expansion of one of them beyond that context would be unexpected. An application of a statute bottomed on an unexpected interpretation of one phrase out of context with its statutory environment would be unconstitutional as violative of procedural due process for failing to adequately warn of the proscribed conduct. United States Const., Fifth Amendment (Appendix A). *Jarecki v. G. D. Searle & Co.,* 367 U. S. 303.

Section 1953 appearing in a Chapter in the United States Code entitled "Racketeering" enumerates certain games associated solely with those gambling activities in the domain of the underworld. Severe penalties are imposed for violations. Exempt from the operation of the statute, however, is state-sanctioned gambling activity. It is unforeseeable that a statute aimed at serious and harmful forms of conduct, worthy of punishment of five years imprisonment, would apply to the conduct here involved, freely indulged in by numerous law-abiding persons at the open invitation of a sovereign state. *Bouie v. City of Columbia,* 378 U. S. 347.[19]

[19] Appellee does not here argue that Congress has no power to make such conduct criminal, but that if Congress intends to exercise such drastic power, it must do so in unmistakably clear language so that those who would be law abiding receive fair warning of the conduct proscribed. Hall, *Strict or Liberal Construction of Penal Statutes,* 48 Harv. L. Rev. 748, 765-67 (1935); That there is no fair warning in this case is evident from the large numbers of non-residents of New Hampshire who have participated in the New Hampshire event (see Appendix C).

III. The government should be precluded from raising the relevance of facts not provable under the indictment, not alleged in the bill of particulars, nor referred to in the Jurisdictional Statement.

In a distinct retreat from the allegations of the indictment (R. 3), the bill of particulars (R. 5), and the Jurisdictional Statement, the appellant now proposes to argue in this Court not merely that appellant was carrying New Hampshire acknowledgments in interstate commerce, but that he was engaged in additional unlawful purpose (Brief for the Appellant, pp. 18-19; p. 14, n. 11). Appellee submits these facts are not properly before this Court because they are not alleged in the indictment nor provable under it. United States Const., Sixth Amendment (Appendix A); *Russell v. United States,* 369 U. S. 749; Fed. R. Crim. P. 7(c). Orfield, Criminal Procedure Under The Federal Rules, Section 7:10 (1966).

A fortiori, is this so in light of the bill of particulars which claims no violation of state law, and specifically that limits the charge against appellee to the mere carriage of New Hampshire acknowledgments in interstate commerce. Bill of particulars (R. 5). Orfield, *supra,* Section 7:143.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should affirm the judgment below.

BETTY D. FRIEDLANDER,
Attorney for Appellee.

October 1966.

APPENDIX A.

Constitutional Provisions.

United States Const., Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Const., Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Relevant Statutes.

18 U.S.C. § 1953. *Interstate transportation of wagering paraphernalia*

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

18 U.S.C. § 1952. *Interstate and foreign travel or transportation in aiding racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1084. *Transmission of wagering information; penalties*

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, pen-

alty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

15 U.S.C. § 1172. *Transportation of gambling devices as unlawful; exception; . . .*

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided,* That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of the section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided further,* That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

. . .

15 U.S.C. § 1178. *Nonapplicability of chapter to certain machines and devices*

None of the provisions of this chapter shall be construed to apply—

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with pari-mutuel betting. . . .

18 U.S.C. § 1301. *Importing or transporting lottery tickets*

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

138 U.S.C. § 1302. *Mailing lottery tickets or related matter*

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

APPENDIX B.

Excerpts From Legislative History of Section 1953 and Companion Statutes.

(A) Purpose of Section 1953 and Its Companion Statutes.

(B) Purpose of Section 1953.

(S.R. 1657; H.R. 3246; H.R. 6571.)

(C) Congressional Policy of Federal Non-interference With Lawful State Gambling Activities and Local Law Enforcement.

SOURCES:

*_The Attorney General's Program to Curb Organized Crime and Racketeering,_ Hearings, Senate Committee on the Judiciary, 87th Cong., 1st Sess. on

S. 1653 To amend Title 18, United States Code, To Prohibit Travel in Aid of Racketeering Enterprises.

S. 1654 To Amend Section 1073 of Title 18, United States Code, The Fugitive Felon Act.

S. 1655 To Amend Chapter 95 of Title 18, United States Code, To Permit the Compelling of Testimony Under Certain Conditions and the Granting of Immunity From Prosecution in Connection Therewith.

S. 1656 To Amend Chapter 50 of Title 18, United States Code, With Respect to the Transmission of Bets, Wagers, and Related Information.

S. 1657 To Provide Means for the Federal Government to Combat Interstate Crime and to Assist the States in the Enforcement of Their Criminal Laws by Prohibiting the Interstate Transportation of Wagering Paraphernalia.

S. 1658 To Amend the Act of January 2, 1951, Prohibiting the Transportation of Gambling Devices in Interstate and Foreign Commerce.

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* Herein referred to as Sen. H.

*Legislation Relating to Organized Crime, Hearings, Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong. 1st Sess. on

H. R. 468 A Bill to Amend Section 1073 of Title 18, United States Code, the Fugitive Felon Act.

H. R. 3022 A Bill to Amend Title 18 of the United States Code to Assist in the Prevention of the Interstate Transmission of Gambling Information.

H. R. 3023 A Bill to Amend Section 1073 of Title 18, United States Code, the Fugitive Felon Act.

H. R. 3246 A Bill to Provide Means for the Federal Government to Combat Interstate Crime and to Assist the States in the Enforcement of Their Criminal Laws by Prohibiting the Interstate Transportation of Wagering Paraphernalia.

H. R. 6571 A Bill to Provide Means for the Federal Government to Combat Interstate Crime and to Assist the States in the Enforcement of Their Criminal Laws by Prohibiting the Interstate Transporttaion of Wagering Paraphernalia.

H. R. 6572 A Bill to Amend Title 18, United States Code, to Prohibit Travel in Aid of Racketeering Enterprises.

H. R. 6909 A Bill to Strengthen the Criminal Laws so as to further protect all persons from the menace of organized and syndicated crime and for other purposes.

H. R. 7039 A Bill to Amend Chapter 50 of Title 18, United States Code, with Respect to the Transmission of Bets, Wagers and Related Information.

**107 *Congressional Record.*

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* Herein referred to as H. H.

** Herein referred to as Cong. Rec.

The Purpose of Section 1953 and Its Companion Statutes.

1. Attorney General Kennedy: Mr. Chairman, I am here today supporting proposed legislation which we, in the Department of Justice believe can be extremely effective in combating organized crime and racketeering. These proposals have been developed in the Department over a period of time to aid and assist local law enforcement officers in controlling hoodlums and racketeers who, in many instances, have become so rich and so powerful that they have outgrown local authorities. H.H. pp. 18-19.

2. Attorney General Kennedy: I wish to emphasize, Mr. Chairman, that we do not seek to preempt the field of enforcement or interfere in any way with the traditional responsibilities of local law enforcement . . . The cooperation between the Federal and local law enforcement agencies which exists today is effective. It is essential in getting action against organized crime, which is so well organized and so well entrenched on a multi-state basis that local law enforcement often is virtually powerless to act without aid and assistance of the Federal Government. S.H. p. 11.

3. Rep. McCulloch: In particular, the Congress should give careful consideration to the growth of syndicated criminal enterprises which are no longer confined within the boundaries of any one of the several States. In short, many of us in Congress, and in the executive Department of the Federal Government, have long been aware of the ever-increasing difficulty faced by local law enforcement officers in coping with the so-called racketeering offenses, and offenders.

These offenses, which are not local in their overall operation and execution, may well justify the intervention

of the Federal Government after we have listened to and developed all the pertinent facts. At this point, I hasten to add that because of the potentially far-reaching consequences of much of the proposed legislation, I am particularly interested in hearing and exploring the views and recommendations of local law enforcement officials. H.H. pp. 4-5.

4. Rep. Celler with respect to S. 1656: This bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets. It does not get after the casual gambler who bets $2 on a race. That type of transaction is not within the purview of the statute. The objective is to strike a stunning blow, a deadly blow against the syndicated rackets which enable these gamblers to reap rich harvests because of their use of the telephone, the Western Union, in getting information. 107 Cong. Rec. 16534.

5. Rep. McCulloch in reference to S. 1653: The bill is wisely limited to those unlawful business enterprises, which experience has demonstrated, have been used by the underworld elements of organized crime. Cong. Rec. p. 16542.

6. Rep. Carroll referring to the package of bills generally: Powerful interstate crime syndicates now do an estimated annual business of $22 billion a year. These syndicates deal in vice and corruption—in gambling, narcotics, prostitution, and liquor violations . . .

It is obvious that a significant part of this increase in the crime rate across the Nation is due to the growing strength of interstate crime—to hoodlums and racketeers, who, says Attorney General Kennedy, Have become so rich and so powerful that they have outgrown local authority. . . .

It is important, Mr. President, that the Attorney General be given the weapons he needs for this battle against organized gangsterism. These bills, amending and strengthening the Federal criminal code statutes, deserve the prompt—and careful—attention of the Congress. Cong. Rec. 13946.

7. Sen. Kefauver: He (Kennedy) is to be commended for developing this legislation (*sic*) program against organized crime . . . With the new weapons given by the Attorney General's legislative program, the Department of Justice should be able to go far toward eliminating the evil of organized crime . . .

. . . the syndicates and racketeers and hoodlums could not carry on their multi-million dollar business without using the channels and facilities of interstate commerce. The power of the Congress to regulate interstate commerce and deny its use to organized crime has been largely unused while the racketeers turned its channels and facilities to their advantage. Cong. Rec. 13947.

8. Attorney General Kennedy: The racketeers and hoodlums in organized crime are becoming more powerful, more wealthy, and more menacing. We have submitted to you a series of bills through which we know the Federal Government can meet its responsibilities and be of great aid and assistance to local law enforcement. S.H. p. 17.

9. Donald S. Leonard, International Association of Chiefs of Police: Organized Crime constitutes not only a menace to legitimate business and society, but also to the Federal Government itself. Crime is everybody's business, costing us about $22 billion each year. The coordinating facilities of the Federal Government can meet the organized racketeer on equal terms without doing violence to the jurisdiction of the States in the field of law enforcement. H.H. p. 253.

10. Attorney General Kennedy: . . . there is considerable evidence that the operators of certain types of lotteries—which are undeniably interstate in character—have adopted various ways to avoid violating the narrow prohibitions of existing law. For example, lottery tickets may be printed in blank at a central point in one State, then transported to other States where the so-called playing numbers are overprinted. Without these numbers the blanks are not within the statutory definition of lottery tickets and their interstate transportation is not prohibited. Under the proposed measure, the blank tickets would be prohibited from interstate shipment as paper designed for use in a numbers or similar game.

The so-called numbers lottery, or one of its infinite variations, operates in virtually every major metropolitan area. Particularly where such a metropolitan area covers part of several States, it is not unusual that the numbers sellers in one State turn over their play to runners who report at a numbers bank in another State. The interstate carrying of slips or writings, indicating the amounts of bets and the numbers played, is essential to this type of operation. The proposed statute would prohibit the interstate carrying of such numbers slips.

The fear of a raid by Federal or local police has turned the attention of the numbers operators and the bookmakers to the problem of quick disposition of the records used in the conduct of the business. This would include the papers used to record the bets or the numbers played by the individual bettor. The operators are making our task more difficult through the use of flash paper for the quick disposition of the records. This paper is highly inflammable and will burst into flame if a cigarette is placed on it. In less time than it will take a law enforcement officer to cross the room, a bookmaker can turn his records into a pile of ashes of no use as evidence against him.

We wish to curtail the interstate transportation of this type of equipment. If we do so, the bookmaker and numbers operator is going to find another specialized type of equipment to frustrate our efforts. We thus are asking for this bill to curtail the interstate shipment of paraphernalia that is used, intended, or designed for use in their activities. With this broad prohibition we hope to be able to keep step with the criminal element as it tries a different approach to the problem. Sen. H. p. 9.

11. Attorney General Kennedy, referring to H.R. 6572: The main target of our bill is interstate travel to promote gambling. It also is aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these funds for corrupting local officials and for their use in racketeering in labor and management. Thus, when we speak of unlawful business it is business engaged in the aforementioned improper activities. H.H. p. 20.

12. As some examples of the type of conduct at which H.R. 6572 was aimed Attorney General Kennedy said:

Our first example is as follows: Some notorious individuals, whose names you would immediately recognize, had interests in a numbers bank but lived in a resort town far from the scene of operation. Every month a messenger carried the profits of the numbers racket from the scene of operations to the resort town. One of the payments was in excess of $250,000. Thus, the persons reaping the profit from the illegal activity remained beyond the reach of the law enforcement officials at the place of operation and committed no crime in the State where they lived. Only the Federal Government can curtail the flow of funds which permit the kingpins to live far from the scene, preventing the local officials, burdened by the gambling activity, from punishing him.

If our bill is enacted we will be able to prosecute the courier who carries the funds across States lines and

in conjunction with the aiding and abetting statute (18 U.S.C. 2) we will be able to prosecute the person who caused the courier to travel—the kingpin. This example illustrates what we have found to be a pattern around the country where the apparently innocuous 10-cent numbers bet in a large city turns into tremendous profits in the hands of bigtime hoodlums.

Another example involves the frequent travel from a Middle Atlantic State to a New England State by the operator of a lottery—and/or members of his family—to make payments to winners or pick up money wagered. Our information reveals that, in order to avoid the statute proscribing interstate transportation of lottery tickets (18 U.S.C. 1301), the individual carried the plates for printing the tickets to the various States. He did that so the tickets could be printed locally.

In another instance in a Midwestern State, the scene of illicit operations is close to the border of the State. One individual travels daily between the two States. He conducts his layoff business in the one State and lives in a $200,000 house in the suburbs of a large city across the border in the other State.

Let me cite another example. The layoff men at the top of the bookmaking organization are in daily contact with each other to reinsure their bets and divide the action, thus assuring that all make a profit and no one takes an exorbitant risk.

These people can conduct their businesses by telephone. When local authorities get close to them, they merely pick up stakes and move to another jurisdiction. The best example of this moving to frustrate local police, is the case of a man who started operations as a layoff man in the Midwest in 1946. He moved to another town in 1949 and then to Newport, Ky., in 1950. In 1952,

under pressure of the Kefauver investigations into organized crime, he moved to Montreal, Canada. When the Royal Canadian Mounted Police raided his establishment he moved back to Newport, Ky.

We can follow these people from State to State and prosecute them for the very activities which now make a mockery of local law enforcement if this travel bill is enacted.

. . .

In summary, our information reveals numerous instances where the prime mover in a gambling or other illegal enterprise operates by remote control from the safety of another State—sometimes half a continent away. He sends henchmen to the scene of operations or travels himself from time to time to supervise the activity and check on his underlings. As for the profits, he receives his share by messenger.

Another example of the type of situation which we are trying to curb in proscribing the interstate travel in furtherance of an unlawful activity is the situation which arose in Hot Springs, Ark., in 1960. A printing company in Jefferson Parish, La., receives race wire information from Chicago bookmakers and disseminates the data to gambling establishments in sections of the South and Southwest. The company is owned by a racketeer, since deported, and his race service manager, of New Orleans. The manager, while in Hot Springs in March of 1960 got into a violent argument with the owner of the race wire service there. The Hot Springs man told the New Orleans man to stay in New Orleans as he could operate his business without help.

In May of 1960, the owner of the Hot Springs service traveled to Chicago and visited a Chicago rackets overlord. The Hot Springs man sought assistance in

curtailing the activities of the New Orleans group in seeking to take over his race wire service. If we could show the existence of race wire services in New Orleans and Hot Springs and the travel on the part of the New Orleans man to expand the New Orleans service and the travel of the Hot Springs man to protect his interest in the Hot Springs service we could prosecute both of these top racketeers with the enactment of the proposed bill.

A race wire service has been provided in Wisconsin by Chicago hoodlums. In return for allowing the race wire service to prosper in Wisconsin, a person, who is now the subject of intensive investigations, has been allocated a portion of Antioch, Ill. for the conduct of gambling. This individual apparently has trained his housemen at Kenosha before they traveled to Antioch to run the gambling operations. Such travel as by the Chicago people to Kenosha and the Kenosha hoodlums to Antioch would violate the bill as travel to promote an unlawful business, thus permitting the interruption if not the destruction of the gambling empires. H.H. pp. 20-23.

13. Exchange between Senator Keating and Assistant Attorney General Herbert S. Miller, wherein Senator Keating urged expansion of the scope of S. 1653.

Senator Keating: . . . Is there any reason other than the practical one why you would not feel like going further than S. 1653, and including the use of other interstate facilities?

Mr. Miller: Senator, let me answer your question in this way: There is the practical problem, which I will put to one side, as you suggest.

The other problem is basically, perhaps, a philosophical one, and that is how far the Federal Government should go in this particular field.

There are some who would feel, I think, perhaps, that if you put one more criminal violation in, you are going too far. And in S. 1653, we tried to tailor-make it, so to speak, to cover the people that we are trying to get, namely those engaged in organized crime.

. . . As I say, in looking at it practically, and in effect, looking at it in the light that we did try to tailor-make this bill to catch specific situations, and where we know the type of an operation involved, we know what is accomplished and what is done and how they use interstate facilities to further these operations . . . Sen. H. p. 111.

Purpose of Section 1953—(S.R. 1657; H.R. 3246; H.R. 6571).

14. Rep. Cahill: . . . I rise in support of S. 1657, a bill to prohibit the interstate transportation of wagering paraphernalia. This is a companion bill to the bill previously passed today by the House and again has as its objective a further aid to the Attorney General in the war on crime in this country.

Once again, it should be pointed out to the House that gambling supplies commercialized racketeers in this country. The manufacturers of wagering paraphernalia must in order to continue in business transport this equipment through interstate commence. This bill, therefore, would choke off at the source such gambling equipment and would permit the Federal Government to enter into the fight against organized crime at the early stage, that is, the time when the equipment is being transported into the various States of the Union.

There are sufficient exemptions in this bill, I think, to permit these activities which are legal in the States and protection has been extended to those activities which

are not designed to aid in the nefarious activities of the racketeers of the country.

This bill was, of course, urged by the Attorney General in his continuing fight against the organized syndicates of the country. Cong. Rec. 16538.

15. Rep. Celler: The primary purpose is to prevent the interstate commerce of wagering material. The purpose actually is to cut off and shut off gambling supplies, in reality to prevent these lotteries and kindred illegal diversions. Cong. Rec. 16537.

16. Sen. Kefauver: S. 1657 denies the channels of commerce to the transportation of gambling paraphernalia where it is sent into a State to be used in violation of the laws of that State. Cong. Rec. 13947.

17. Rep. McCulloch: The coverage of this bill is aimed at the shipment in interstate commerce of material which will be used to violate local law. The need for this bill is graphically illustrated by the limitation which local law enforcement officials are faced in being unable to cope with criminal enterprise which transcends the boundaries of a particular State. Cong. Rec. 16538.

18. Sen. Eastland: The Attorney General, in his testimony before the Judiciary committee stated that the use of the mails in advertising and conducting a bookmaking business did not violate present lottery statute because the selection of winners may require some skill or knowledge rather than mere chance . . . Nor do the lottery statutes in their present form cover the many thousands of sports betting slips which are transported daily across State lines, for they do not meet the traditional definitions of a lottery. . . . Even out and out lottery tickets may be shipped across State lines with impunity if they are printed in blank, shipped, and then locally overprinted with the playing numbers. . . .

It is anticipated that this bill will be of material assistance in bringing about a sharp curtailment of interstate wagering, and the shipment interstate of the wherewithal to conduct wagering activities in any one State. Bookmakers, as well as lottery and policy operators, need the channels of interstate commerce for bit-time operations. State law enforcement officials have been virtually handcuffed in trying to cope with them and the Federal Officials have lacked the statutory authority to render full assistance. With this bill, both may work hand in hand, as a team dedicated to the eradication of one of the great evils on the American scene today. Too many children go hungry because family funds needed for groceries are dumped into the coffers of the vice lords; too many government officials are tempted from their sworn duty by the bribes offered to them by the gamblers who mark up such outlays as the expenses of doing business. With the Federal Government assistance the local authorities will not be frustrated in their efforts, and as a result they may be expected to be even more diligent in their work than they have been in the past. Cong. Rec. 13902, 13903.

19. Assistant Attorney General Miller: This bill is one aspect of the Department's intensive attack on organized gambling, which supplies the bankroll for all the other multi-state criminal activities which tax the American people to the tune of $22 billion a year. Our records indicate that the three most prevalent types of gambling involve bookmaking, wagering pools on sporting events and the so-called numbers racket. H.H. p. 350.

20. Frank O'Connor, N. Y. Queens County District Attorney: Also dealing with the nationwide network of gambling rackets now under the control of the underworld syndicates are H. R. 3246, H. R. 6571 and H. R. 6572. H.H. p. 234.

21. Attorney General Kennedy said of S. 1657: As experience has shown with the Johnson Act, organized crime has great ingenuity in avoiding the law. The purpose of the broad prohibition in S. 1657, against interstate transportation of gambling paraphernalia, is to permit law enforcement to keep pace with the latest developments in this field. S.H. p. 14.

22. In introducing H. R. 6571 Attorney General Kennedy said: Another area of gambling which needs attention, if we are to make a coordinated and successful attack on organized crime, is the easy interstate transportation of wagering paraphernalia. H.H. p. 29.

23. In discussing the need for the broad language H. R. 6571, Attorney General Kennedy said: With this broad prohibition we hope to be able to keep step with the criminal element as it tries a different approach to the problem. H.H. p. 31.

24. Rep. Cramer, in support of Title VI of H. R. 6909, a bill similar to H.R. 6571, said: This title of my bill would make it a felony to send or carry knowingly in interstate or foreign commerce any wagering paraphernalia or device used, adapted or designed for use in bookmaking, wagering pools with respect to a sporting event or numbers, policy, bolita or similar illegal games. Bookmakers and lottery and policy operators presently thrive on widescale interstate operations. . . H.H. p. 97.

25. In answer to criticism that Title VI of H. R. 6909 cast the net too wide, Rep. Cramer said: Gambling paraphernalia, of course, is specifically limited to those things illegal in all States, involving numbers, rackets, and that sort of thing, so the question of the chairman, I think, is answered in that respect. H.H. p. 60.

26. When asked about the broadness of the concept of paraphernalia, Attorney General Kennedy said: That is

a broad word; but all those words are restricted as to the kind of event by (a), (b) and (c). H.H. p. 45.

27. Assistant Attorney General Miller discussing the scope of S. 1657 said: Senator, if I may, of course, we did attempt, I mean in all of these bills you have got two problems. One is specificity, and the second is that you do not want the bill so broad, as you so well pointed out to encompass activities which are perhaps innocent.

You do not want to bring an innocent man within the purview of the statute . . . We did attempt to limit the statute . . . by making the specific language of these various types of items we listed here applicable to three types of gambling only: that is, bookmaking, wagering pools, sporting events and your numbers game.

So those, we felt, would be the three biggest gambling operations and that was the type of thing we were aiming at. We did not attempt, for example, to cover, in normal gambling, cards or dice or punchboards or anything of that nature. S.H. p. 292.

28. In answer to whether a punchboard would be within the prohibitions of this bill, Rep. Cramer said: I just don't think there is any relationship between it and numbers, policy and bolita. They are very well-established types of gambling devices and a punchboard is not a similar game. H.H. p. 125.

29. When asked if bingo would be within the bill, Attorney General Kennedy said: Bingo in our judgment is not numbers, it is not policy and it is not bolita. It is not similar. H.H. p. 45.

30. Nathan Skolink, New York State Commission of Investigation: . . . bookmaking is the heart of illegal gambling . . . the bookmaker cannot operate alone, requiring, to a greater or lesser extent, a syndicate or organization and related services . . .

These indispensable services which keep bookmaking alive and fluorishing come from different parts of the United States. These services include wire communications and the transportation of gambling equipment and paraphernalia in interstate commerce. H.H. p. 272.

31. Mr. Celler: This bill only gets after the bookmaker, the gambler who makes it his business to take bets or lay off bets. It does not get after the casual gambler who bets $2 on a race. That type of transaction is not within the purview of the statute. Cong. Rec. 16534.

32. Attorney General Kennedy: American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills. The only toes tread on here are those of the racketeers and hoodlums. S.H. p. 17.

Congressional Policy of Federal Non-Interference With Lawful State Gambling Activities and Local Law Enforcement.

33. Rep. Celler: Thus, it can be said that there is ample need for these hearings to meet the problem of syndicated crime as it exists and as we know it today in America. But, on the other hand, a word of caution is necessary. Whenever there is expansion of Federal criminal jurisdiction as an auxiliary to State law enforcement a studied and deliberate approach to such expansion is most necessary. Basically, many of these organized crimes are local problems, and thus, to expand Federal jurisdiction over them would create many new difficulties. Additional Federal administrative problems may arise. There may be a tendency to weaken local law enforcement efforts due to Federal intervention. There is the serious problem also of the anomalies arising out of dual jurisdiction, such as dual prosecution—Federal and State

—for the same crime, the question of immunity, the filing of detainers, the disparity of sentencing. H.H. p. 3.

34. Donald Leonard, International Association of Police Chiefs: Local crimes should be and are suppressed by local authority; but interstate or national crime requires the attention of the Federal Government in fulfilling its obligation to the States.

None of these bills before us now provide for exclusive Federal jurisdiction. Each State retains its own power to deal with the criminal, but State enforcement is enhanced by plugging up the loopholes used by crooks and racketeers to avoid State apprehension and punishment. H.H. p. 253.

35. Assistant Attorney General Herbert J. Miller:

One thing that, frankly, we did not think about, was the fact that where you have legalized pari-mutuel tracks around the country, these tickets are sometimes manufactured, say, in Ohio and they are shipped to Miami, then used in pari-mutuel betting. Well, now, that type of betting, we feel, since it does deal with a legalized operation under State law, we should have perhaps an exclusion in here on that, to cover it.

The Chairman. You concluded that that should be eliminated so that there would be no possibility of their being held for a crime?

Mr. Miller. Yes. H.H. p. 352.

36. Assistant Attorney General Miller referring to H.R. 6572: You have to tie interstate travel to an unlawful, illegal transaction, otherwise any place you travel interstate would be covered.

Nevada, of course, is the best example, which we went into with Congressman Rogers. There it is legal. If that is the policy of the State to permit gambling that is a determination by the State that it is legal. Now, a man travelling in furtherance of that gambling activity, to say he takes the proceeds, deposits them in a bank in New York, I can't conceive he falls within the provisions of this bill because there is no unlawful business he is furthering. H.H. p. 343.

37. Rep. Celler said of H. R. 7039: Modern bookmaking and gambling, we know, depends on rapid communications of betting odds and lay offs.

Mr. Speaker, we have provided certain safeguards in the bill; for example the transmission of betting information from a State where gambling is on a race or contest is legal into a State where gambling on that particular race or sporting contest is also legal is exempted from the operation of the statute . . . Bona fide news reporting of sporting events is exempt and not interfered with. Cong. Rec. 16533.

38. Attorney General Kennedy: I wish to emphasize, Mr. Chairman, that we do not seek to pre-empt the field of enforcement or interfere in any way with the traditional responsibilities of local law enforcement . . . Sen. H. p. 11.

39. In relation to H.R. 468, the Fugitive Felon Act, Attorney General Kennedy: It is to help and assist the States, Mr. Chairman, not to try to gain jurisdiction ourselves . . .

Rep. McCulloch: But you have no intention of preempting action by the States if they are able to do the job?

Mr. Kennedy: Absolutely not. H.H. p. 42.

40. Attorney General Kennedy: These bills carefully limit the activities of the Federal Government to the most important and the most dangerous problems now facing law enforcement. Sen. H. p. 17.

41. Rep. McCulloch: Mr. Speaker, S. 1657 is another one of the series of bills, aimed at organized crime, which has the support of this administration . . .

S. 1657 will make it unlawful to transport in interstate commerce the paraphernalia and material which is used by professional bookmakers and numbers men. There is a special exemption for pari-mutuel betting equipment and betting material transported into States in which the use of such materials is legal.

The coverage of this bill is aimed at the shipment in interstate commerce of material which will be used to violate local law. The need for this bill is graphically illustrated by the limitation with which local law enforcement officials are faced in being unable to cope with criminal enterprise which transcends the boundaries of a particular State. Cong. Rec. 16538.

42. Rep. McCulloch: These offenses, which are not local in their overall operation and execution, may well justify the intervention of the Federal Government after we have listened to and developed all the pertinent facts. At this point, I hasten to add that because of the potentially far-reaching consequences of much of the proposed legislation, I am particularly interested in hearing and exploring the views and recommendations of local law enforcement officials. H.H. pp. 4-5.

43. An exchange between Rep. Celler and Arnold Bauman, N. Y. County Lawyer's Assoc.: The Chairman: On that point, Mr. Bauman, I would like to make this observation. Getting to the leaders is fine. Don't you think that we could be making a serious mistake when we begin

to rely too heavily on Federal Government, Federal enforcement agencies, where there is the ability in the local law enforcement agencies to prosecute and handle these situations, and that there might be a tendency on the part of the local law enforcement agencies to break down?

Mr. Bauman: I could not agree with your statement more, Mr. Chairman, I think that is absolutely right . . . What I think should be done, is in effect, what the Attorney General is seeking to do here . . .

There is no question in my mind that is a good approach . . . It would be a serious mistake, gentlemen, to disperse your efforts in law enforcement by attempting to take on the local range.

The Chairman: If this is just to get to the small fry, the little bookmakers, all these other little people, instead of the kingpins, then we make a serious mistake?

Mr. Bauman: I agree with that, sir. H.H. pp. 332-333.

APPENDIX C.

1964, 1965, 1966 New Hampshire Sweepstakes Total Prize Winners by State and Foreign Countries.

(See opposite page.) ☞

1964, 1965, 1966 New Hampshire Sweepstakes
Total Prize Winners by States and Foreign Countries

	No. of Tickets Drawn & Matched with a Horse	Consolation Prizes	Bonus Drawings	Total
Alabama	2	--	1	3
Alaska	2	1	--	3
Arizona	7	1	1	9
Arkansas	2	1	--	3
California	92	10	4	106
Colorado	6	--	--	6
Connecticut	711	96	25	832
Delaware	19	1	--	20
Florida	93	16	3	112
Georgia	6	1	2	9
Hawaii	2	--	--	2
Idaho	1	--	--	1
Illinois	25	4	2	31
Indiana	17	7	1	25
Iowa	8	2	--	10
Kansas	2	--	--	2
Kentucky	3	--	--	3
Louisiana	8	1	1	10
Maine	158	18	10	186
Maryland	48	6	--	54
Massachusetts	2104	239	75	2418
Michigan	55	9	4	68
Minnesota	4	1	1	6
Mississippi	1	--	--	1
Missouri	16	4	--	20
Nebraska	4	2	--	6
Nevada	1	--	--	1
New Hampshire	1185	167	70	1422
New Jersey	690	108	36	834
New Mexico	2	--	--	2
New York	1131	175	43	1349
North Carolina	8	2	--	10
Ohio	57	10	1	68
Oklahoma	3	--	--	3
Pennsylvania	314	50	10	374
Rhode Island	245	32	3	280
South Carolina	3	--	--	3
South Dakota	1	--	--	1
Tennessee	3	2	--	5
Texas	10	5	2	17
Vermont	70	8	2	80
Virginia	39	4	--	43
Washington	13	--	1	14
West Virginia	3	1	--	4
Wisconsin	10	1	--	11
District of Columbia	25	4	--	29
Foreign Countries				
Canada	62	11	1	74
Canal Zone	2	--	--	2
England	1	--	--	1
Germany	2	--	--	2
Ireland	2	--	--	2
Philippine Islands	2	--	--	2
Sweden	--	--	1	1
Total	7280	1000	300	8580

Summary: 45 States, District of Columbia, 7 Foreign Countries

APPENDIX D.

New Hampshire Sweepstakes Program.

(See opposite page.) ☞

NEW HAMPSHIRE
Sweepstakes
Program

an aid...

...to education

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Governor John W. King

Executive Councilors

District	1	William A. Styles, *Northumberland*
District	2	Austin F. Quinney, *Exeter*
District	3	Emile Simard, *Manchester*
District	4	Robert L. Mallat, Jr., *Keene*
District	5	James H. Hayes, *Concord*

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* * * * * * * * *

NEW HAMPSHIRE SWEEPSTAKES COMMISSION

State House Annex, Concord, New Hampshire

HOWELL F. SHEPARD, *Chairman* — Commissioner

HENRY J. TURCOTTE — Commissioner

EDWARD SANEL, SR. — Commissioner

EDWARD J. POWERS
Executive Director

LEO A. HOGAN
Executive Officer

JAMES M. KENNEDY
Executive Officer

June 1, 1966

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BACKGROUND

1. Q. When was the Sweepstakes program established?

   A. Governor John W. King signed the bill legalizing the Sweepstakes program on April 30, 1963, and it became law 60 days thereafter.

2. Q. How much money was appropriated by the Legislature to initiate this program?

   A. The Legislature appropriated $250,000 from the General Fund of the State. The Sweepstakes Commission used only $85,360.36 to initiate the program and this amount was repaid to the General Fund within a few weeks after the sale of tickets started.

3. Q. What were the results of the local option voting of the cities and towns on March 10, 1964?

   A. Registered voters of each city and town voted by special ballot as to whether they desired Sweepstakes tickets sold in their respective communities. The people voted in a majority of over 3 to 1 in favor of the Sweepstakes program. Only twelve towns of a total of 237 cities and towns in New Hampshire voted against the program. The population of these towns is less than 2% of the total population of the State. All of the cities and towns with a State liquor store or licensed race track voted in favor of the program. Under the Sweepstakes law, the cities and towns will again vote on this question in November, 1966, and every two years thereafter.

4. Q. When did the tickets go on sale for the first time?

   A. Tickets were sold at Rockingham Park race track for the first time on the evening of March 12, 1964. Governor John W. King purchased the first ticket bearing No. 0000001. The ticket-dispensing machines were installed in the State

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liquor stores during the week of March 23, 1964, and these installations were completed by March 31.

POLICIES AND PROCEDURES

5. Q. Are mail orders for tickets accepted?

   A. Mail orders for tickets are not accepted by the Commission. Many letters enclosing cash and checks for the purchase of tickets have been received and in all instances have been returned to the senders. U.S. postal regulations prohibit the use of the mails in the purchase of tickets.

6. Q. Are members of the Sweepstakes Commission or its staff eligible for prizes?

   A. No, the Sweepstakes Commission has adopted a policy that no member of the Commission or its staff is eligible for a prize.

7. Q. Is it permissible for minors to purchase tickets?

   A. Tickets will not be sold to persons under the age of 21. However, it is permissible for an adult to purchase a ticket in the name of a minor.

8. Q. Where are Sweepstakes tickets sold?

   A. Tickets are sold only in New Hampshire at State liquor stores, licensed race tracks, the Commission's office in Concord, branch offices at highway toll information parking areas at Hampton and Hooksett, N.H., and sales office on Route 28 highway at Rockingham Park, Salem, N.H. There are 51 State liquor stores and two licensed parimutuel race tracks, Rockingham Park race track, Salem, N.H., and Hinsdale Raceway, Hinsdale, N.H. Tickets are sold at Rockingham Park throughout the year irrespective of whether a race meet is in session. Tickets are sold Monday through Saturday at all sales outlets.

9. Q. What is the cost of a Sweepstakes ticket?
A. $3.00.

10 Q. How are the tickets sold?

A. They are sold from specially designed ticket-dispensing machines. The tickets themselves remain in the machines, and the purchaser receives an acknowledgment which is ejected from the machine. The acknowledgment need not be retained or presented in order to participate in prizes. It is not a claim on a prize or a document of title. Both the tickets and acknowledgments are printed on NCR (no carbon required) paper, specially manufactured for the New Hampshire Sweepstakes Commission and incorporating numerous safety features.

11. Q. Is a name and address required on the Sweepstakes ticket?

A. Yes, the purchaser prints a name and address on each ticket and receives an acknowledgment of purchase. This acknowledgment contains the name and address and ticket number. The acknowledgment is non-saleable and non-transferable, and prizes are awarded on the basis of the name and address on the ticket which remains in the ticket-dispensing machine. For this reason the use of nom de plume is discouraged, since a winner who has used a nom de plume may experience difficutly in providing acceptable identification and thereafter cashing his prize.

12. Q. Is it possible for a person to purchase tickets in the names of others?

A. A person may purchase tickets in the names of others. For example, if the purchaser wishes to buy tickets for relatives or friends, he may do so by printing the names and addresses of such persons and only the named persons will be eligible for a prize.

13. Q. Is it permissible to buy tickets in the names

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of social, business, charitable or religious organizations?

A. Tickets may be purchased in the names of any of the above-described organizations, and any prize would be paid to such organizations as their names appear on the tickets.

14. Q. May tickets be purchased by persons who do not reside in New Hampshire?

A. Non-residents may purchase tickets in New Hampshire at the authorized locations either in their own names or the names and addresses of others.

15. Q. Is there any limit to the number of tickets which may be purchased?

A. A purchaser may buy only ten tickets at any one time through the ticket-dispensing machines. This policy was adopted by the Commission to prevent a machine from being tied up for an undue period of time where a purchaser is buying tickets in quantities of more than ten, and where there is a line of persons desiring to buy tickets. In the event a person wishes to purchase more than ten tickets, he may do so by returning to the attendant and purchasing the additional tickets, not to exceed ten at a given time. The ticket-dispensing machine may be activated for no more than ten tickets at one time. Special arrangements have been made for volume purchases where a quantity of tickets is desired.

16. Q. What are the arrangements for volume purchases?

A. Purchase of ten or more tickets may be made at Rockingham Park race track, Salem, N.H., the Commission's office in Concord, and at all State liquor stores. Application blanks for volume purchases are available at all sales outlets. Purchasers may submit lists of names and addresses at these locations. Sales clerks will either type or print the tickets. Depending on the number of names submitted, purchasers may

desire to return later and obtain their acknowledgments of purchase.

17. Q. Is electronic data processing equipment used to account for the tickets and funds?

A. The Merchants National Bank, Manchester, N.H., is the clearing house bank to receive, process and record all tickets and funds, as well as to provide vault storage for the tickets. This bank has the most modern type of electronic data processing equipment; daily computer reports account for the sale of tickets at each location. Banks throughout the State of New Hampshire are also cooperating in the program and receive daily deposits of tickets and funds from each of the selling locations.

18. Q. What security is provided for the sold tickets after they are deposited in the area bank?

A. The sold tickets are placed in the vault of the area bank where they remain until they are microfilmed by Sweepstakes Commission employees. Thereafter they are transported to the Merchants National Bank in Manchester where they remain in vault storage until time for the public drawings. The principal reason for microfilming the tickets is to insure against any mishap that might occur in the transportation of the sold tickets from the area bank to Merchants National Bank.

19. Q. How will the prize be paid if a Sweepstakes ticket is made out in more than one name?

A. While the Sweepstakes ticket is designed for only one name, the prize will be paid to whatever name or names appear on the ticket. E.g. James Jones and family; John and Mary Roe; Henry Smith et al.

20. Q. How are prize winners notified and paid their prizes?

A. Immediately after the drawings each winner is notified by telegram. After the race has been run, the prize winnings are deposited at the

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Merchants National Bank, Manchester, N.H. to the names and addresses of the winners. The prize winners are thereafter paid through normal commercial bank channels. This is true of both New Hampshire and out-of-state winners. Of course, a prize winner may appear at the bank in person to claim his prize.

21. Q. Is the amount of prize winnings determined by the drawings?

A. The drawings are used to draw tickets at random and match them with all horses nominated for the race. The amount of prize is determined by whether the horse runs in the race and if so, where it finishes. At the time the drawings are conducted, the identities of the horses that will run in the race are not known; however, every ticket drawn and matched with a horse is certain to win a prize.

22. Q. How are the drawings conducted?

A. All drawings are conducted in public. The tickets are placed in large plexiglass drums, electrically rotated. Each drum contains $500,000 worth of tickets (166,667 tickets). There is a small drum containing the names of all horses nominated for the races. After rotation of the drums to insure thorough mixing, a Sweepstakes ticket is drawn from each drum and matched with each nominated horse. Thereafter 75 tickets are drawn from each drum for consolation prizes of $100 each. The consolation prize tickets are not matched with horses. Since there have been 450 horses nominated for the 1966 Sweepstakes races, this means there will be a total of 525 prizes for each drum of $500,000 worth of tickets sold. In the 1964 and 1965 Sweepstakes, each drum contained a million dollars worth of tickets sold, but this was changed to $500,000 worth of tickets in each drum to facilitate the tumbling action of the tickets and to permit faster sales completion of the drums. Many people desire to

make sure they have purchased tickets for each drum and thereby have a chance at all of the prizes in each drum of tickets.

23. Q. When will the drawings be held?

A. The drawings will be held a few days prior to each race.

24. Q. What determines whether a horse will run in the race?

A. This is a decision of the horse owner who has nominated his horse for the race. If the owner pays the entry and starting fees, his horse will then be eligible to run in the race. He will not pay these additional fees unless he believes his horse has a reasonable chance of sharing in the purse. The entry fee is paid a few days prior to the race and the starting fee is paid the morning of the race.

1964 AND 1965 SWEEPSTAKES

25. Q. How many Sweepstakes tickets were sold?

A. For the 1964 Sweepstakes a total of 1,910,-031 Sweepstakes tickets, representing $5,730,-093, were sold.
For the 1965 Sweepstakes a total of 1,300,532 tickets, representing $3,901,596, were sold.

26. Q. When were the races held?

A. The 1964 N.H. Sweepstakes Classic was held on September 12 and the 1965 race was held on September 4 at Rockingham Park race track, Salem, N.H.

27. Q. How many prize winners were there?

A. In the 1964 Sweepstakes there were 1992 prize winners who shared $1,800,000 in prizes. These prize winners were from 37 states, the District of Columbia, Canal Zone, Ireland, and Canada. In the 1965 Sweepstakes there were

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2088 prize winners who shared $1,400,000 in prizes. These prize winners were from 35 states, the District of Columbia, Canada, Germany, and the Philippines.

28. Q. What were the purse and the results of the 1965 Sweepstakes race?

A. The purse for the 1965 Sweepstakes race was $250,000 added. The word "added" means that all of the nominating, entry and starting fees are added to the purse. The Sweepstakes Commission contributed $200,000 to this purse and Rockingham Park race track $50,000. The total purse amounted to $280,220. There were 422 horses nominated for the race and 10 horses actually ran. The first four horses finished as follows: (1) Pass The Word, (2) Hail To All, (3) Naturalist, (4) Munden Point.

29. Q. What were the net proceeds distributd for public education?

A. The net proceeds for the 1964 Sweepstakes amounted to $2,768,088.59. The state Treasurer distributed these proceeds on December 15, 1964 to all State school districts on a flat grant per resident pupil basis. The net proceeds were distributed on the basis of 114,000 pupils or approximately $24 per pupil. The net proceeds for the 1965 Sweepstakes amounted to $2,487,-365.85. This figure includes the refund of $617,-808.49, including interest, by the Federal Government for the federal excise taxes paid by the Sweepstakes Commission for 1964 ticket sales and $110,966.73, including interest, for the 1965 ticket sales. In June, 1965, Congress exempted the N.H. Sweepstakes from the 10% Federal Wagering Tax. The net proceeds were distributed on the basis of 120,000 pupils, or approximately $21 per pupil.

30. Q. How much has the Sweepstakes program contributed to public education since it began on March 12, 1964?

A. In the first year and a half of operation, the New Hampshire Sweepstakes provided $5,255,454.44 for the State school districts as an aid to public education. This $5,255,454.44 represents an increase of over 50% for State aid provided public education during this period.

31. Q. What were the expenses for the 1965 Sweepstakes program?

A. The operating expenses total $478,192.91, which includes the $97,011.58 paid to the State Liquor Commission for the sale of tickets by their personnel. In addition, $200,000 was paid as the State's share of the purse for the 1965 N.H. Sweepstakes Classic.

1966 SWEEPSTAKES PROGRAM

32. Q. How many races will there be for the 1966 Sweepstakes?

A. There will be two Sweepstakes races in 1966. The first Sweepstakes race, called the Rockingham Special, with a purse of $75,000 added, is scheduled for July 16, 1966. The New Hampshire Jockey Club will contribute all of the purse for this race. The second Sweepstakes race, called the N.H. Sweepstakes Classic, with a purse of $250,000 added, is scheduled for September 3, 1966. The Sweepstakes Commission will contribute $200,000 of this purse and the New Hampshire Jockey Club $50,000.

33. Q. What are the nominating, entry, and starting fees?

A. The nominating fee for both races is $10. The entry fee for the Rockingham Special is $500, and the starting fee $1,000. The entry fee for the N.H. Sweepstakes Classic is $1,000 and the starting fee $1,500. Nominations closed March 1, 1966.

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34. Q. What is the distance for the races?

A. The Rockingham Special will be 1 mile and a furlong. The N.H. Sweepstakes Classic will be the Lou Smith Course (1 mile and ¼).

35. Q. When did tickets go on sale for the 1966 Sweepstakes?

A. Tickets for the first race of the 1966 Sweepstakes went on sale at all sales outlets on September 1, 1965 and will continue through July 9, 1966. Tickets for the second Sweepstakes race went on sale on March 4, 1966 and will continue through August 27, 1966. Tickets for the 1967 Sweepstakes will go on sale August 29, 1966.

36. Q. Will all horses nominated be eligible to run in the two Sweepstakes races?

A. Yes. All horses nominated will be eligible to run in either or both of the Sweepstakes races. The finest horses in the nation are included in the 450 horses nominated for the two 1966 Sweepstakes races.

37. Q. What is the prize schedule for the 1966 races?

A. A complete series of prizes, starting with $50,000, $25,000, and $12,500, will be awarded for each half million dollars of sales. Each series will consist of one prize for each horse that has been nominated, plus 75 consolation prizes. Since 450 horses have been nominated for the races, there will be a total of 525 prizes in each half-million-dollar series. Prizes for each series will be awarded as follows:

Owner of ticket on winning horse	$50,000
Owner of ticket on second horse	25,000
Owner of ticket on third horse	12,500
Owners of tickets on other starters share in a pool of	20,000
Owners of tickets on non-starters share in a pool of	60,000

CONSOLATION PRIZES

For each half million dollars of tickets sold, there will be 75 consolation prizes of $100 each.

38. Q. Does the same prize schedule apply to both Sweepstakes races?

A. Yes. The same prize schedule applies to both Sweepstakes races. Of course, a separate series of tickets will be sold for each race and, therefore, tickets sold for the first race will not be eligible for prizes in the second race.

39. Q. Why was the prize schedule changed for the 1966 Sweepstakes?

A. The prize schedule was changed to double the number of prizes and thereby double the chances of winning a prize. Also, the new schedule gives greater distribution of the prize money and leaves more of it with the public after taxes.

40. Q. What are the bonus drawings?

A. The bonus drawings were an innovation for the 1966 Sweepstakes. The Commission decided to award $5,000 in prizes to encourage early buying of tickets. There were 100 prizes of $50 each and two bonus drawings were held. The $5,000 bonus drawing on January 5, 1966 was for all tickets sold from September 1, 1965 to December 24, 1965. The $5,000 bonus drawing on April 20, 1966 was for all tickets sold from December 27, 1965 to April 9, 1966.

At each bonus drawing the numbers of all sold tickets were stored on disks in the IBM 1440 computer at the Merchants National Bank, Manchester, and a random number generator was used to select the lucky winners. After the numbers had been selected, the tickets were checked to determine the name and address of the owner of each winning ticket. The drawings were held in the lobby of the Merchants National Bank and closed-circuit television was employed

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so the public and press could conveniently view the proceedings.

All tickets that participated in the two bonus drawings remain eligible to participate in the main drawing before the race for which they were bought.

GENERAL INFORMATION

41. Q. Have business firms purchased tickets as promotional items for their customers or as incentives for their employees?

A. Yes, the use of Sweepstakes tickets as incentive items has been increasingly attractive to business firms. For example, a national dairy company, a nationwide electrical manufacturer, merchants associations, chambers of commerce, a national plumbing supply company, and New Hampshire supermarkets have used Sweepstakes tickets as a stimulus to business or as an incentive for increased efficiency on the part of their employees.

42. Q. Have Sweepstakes clubs been formed for the purchase of tickets?

A. Yes. Sweepstakes clubs have been formed in social groups, manufacturing plants, and offices to purchase tickets on a weekly basis. A name is given to the club and the ticket is made out in this name with the name and address of the treasurer. All contributors share equally in any prize that may be won. In the 1965 Sweepstakes a club consisting of 13 fellow employees of a manufacturing plant in Manchester, N.H., shared in a prize of $100,000.

43. Q. Are the tickets and acknowledgments printed on safety paper?

A. Safety paper is specially manufactured for the New Hampshire Sweepstakes Commission and printed by Royal Business Forms, Nashua, N.H., with several additional safety features.

Since the tickets, on which all prizes will be based, remain in the possession of the Commission, it is impossible for counterfeit tickets to enter the system. The tickets are in continuous form in consecutive numbers and this feature provides internal safeguards, quick accountability and expeditious filing.

44. Q. What does the staff of the Sweepstakes Commission consist of at the present time?

A. The staff consists of the following employees: Executive Director, Executive Officer in Charge of Field Operations, Executive Officer in Charge of Systems Control, four Supervisors, two Assistant Supervisors, three Maintenance Repairmen, two Stenographers, one Accountant, and a Clerk Typist for a total of 16 persons. Sales of tickets at the race tracks and at the toll station parking areas are handled by sales clerks employed by the Sweepstakes Commission on a temporary basis. Persons selling tickets at the State Liquor Stores are employees of the New Hampshire State Liquor Commission.

45. Q. How much is paid the State Liquor Commission for their services in selling Sweepstakes tickets?

A. By legislative enactment, the State Liquor Commission is paid 4% of their gross ticket sales, or 12¢ per ticket.

46. Q. What are the principal objectives of the Sweepstakes Commission?

A. The principal objectives are to establish an honest, efficient, workable program that will encourage and promote the sale of tickets, thereby providing substantial revenue for public education.

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SWEEPSTAKES TICKET
SALES LOCATIONS
State Liquor Store
Race Track
Highway Toll Plaza
COLEBROOK
GROVETON
BERLIN
LANCASTER
WHITEFIELD
LITTLETON
WOODSVILLE
NO. WOODSTOCK
CONWAY
NEW HAMPSHIRE
PLYMOUTH
ASHLAND
MEREDITH
LEBANON
BRISTOL
WOLFEBORO
LACONIA
FRANKLIN
CLAREMONT
FARMINGTON
NEWPORT
PITTSFIELD
ROCHESTER
PENACOOK
CONCORD
SOMERSWORTH
DOVER
HILLSBORO
SUNCOOK
NO. WALPOLE
HOOKSETT
PORTSMOUTH (2)
MANCHESTER (5)
EXETER
KEENE
HAMPTON
PETERBOROUGH
DERRY
HINSDALE
JAFFREY
MILFORD
PLAISTOW
SEABROOK
HINSDALE RACEWAY
SALEM DEPOT
GREENVILLE
NASHUA (3)
ROCKINGHAM PARK
PELHAM

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STATE LIQUOR STORE LOCATIONS

46	Ashland	Main Street
5	Berlin	103 Pleasant Street
44	Bristol	72 Lake Street
8	Claremont	104 Pleasant Street
18	Colebrook	Main Street
1	Concord	161 North Main Street
28	Conway	Route No. 16
20	Derry	24 West Broadway
9	Dover	328 Central Avenue
25	Exeter	36 Portsmouth Avenue
43	Farmington	Route No. 11
17	Franklin	190 Central Street
22	Greenville	Main Street
26	Groveton	Main Street
35	Hillsboro	Henniker Street
48	Hinsdale	Main Street
36	Jaffrey	135 Peterboro Road
15	Keene	37-39 Roxbury Street
12	Laconia	390 Main Street
37	Lancaster	95 Main Street
11	Lebanon	9 Court Street
7	Littleton	Lisbon Road
2	Manchester	1204 Elm Street
3	Manchester	513 Main Street
10	Manchester	611 Elm Street
31	Manchester	Cor. Valley & Lincoln St
33	Manchester	430 Second Street
42	Meredith	Route No. 3
30	Milford	Main Street
4	Nashua	19 Railroad Square
27	Nashua	260-A Main Street
50	Nashua	Daniel Webster Highway
24	Newport	16 Depot Street
40	No. Walpole	16 Church Street
47	No. Woodstock	Main Street
51	Pelham	Route No. 38
32	Penacook	42 South Main Street
21	Peterboro	Route No. 202
45	Pittsfield	Water Street
49	Plaistow	Route No. 125
19	Plymouth	57 Main Street
6	Portsmouth	58 State Street
38	Portsmouth	Interstate Highway
14	Rochester	Signal Street
34	Salem Depot	South Broadway
41	Seabrook	Lafayette Boulevard
13	Somersworth	33 Main Street
28	Suncook	116 Main Street
29	Whitefield	Astle Block, King Square
39	Wolfeboro	Wolfeboro Falls
16	Woodsville	89 Central Street

Licensed Race Tracks

Rockingham Park	Salem
Hinsdale Raceway	Hinsdale

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1966.

United States, Appellant, v. Anthony L. Fabrizio.	On Appeal From the United States District Court for the Western District of New York.

[December 12, 1966.]

Mr. Justice Harlan delivered the opinion of the Court.

An indictment filed in the United States District Court for the Western District of New York charged appellee Fabrizio with knowingly carrying "in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, . . . records, papers and writings, to wit: 75 acknowledgments of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U. S. C." That section provides in pertinent part:

"(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

"(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where

legally acquired, or parimutuel materials used or designed for use at racetrack or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication."

In response to a limited demand for a bill of particulars the Government stated that the only records, papers, and writings in issue were the specified 75 acknowledgments, and that no violation of state law was charged. Appellee then moved to dismiss the indictment on the ground that it did "not set forth facts sufficient to charge the Defendant with the violation of" this statute. In a supporting affidavit three specific shortcomings were claimed. Appellee first contended that § 1953 was intended only to reach the activities of organized crime or those participating in an illegal gambling or lottery enterprise. Absent an allegation that he was of this class no crime under the statute was charged. Appellee also contended that the indictment was deficient under the statute for failure to name an "illegal" wagering pool, the New Hampshire lottery being a state enterprise. Finally, it was urged that the allegation in the indictment that the acknowledgments were "to be used, and adapted, devised and designed for use" in the New Hampshire Sweepstakes was impossible in fact or rested on a misinterpretation of "use" since the acknowledgments were valueless, and need not have been retained in order to collect on the sweepstakes.

The District Court thereupon dismissed the indictment holding that "the charge in the indictment does not come within the purpose of Section 1953 . . . as dis-

closed in the legislative history of the Act." The Government brought the case directly here under the provisions of the Criminal Appeals Act, 18 U. S. C. § 3731. Our function under that Act is limited to the construction of the statute and "this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193. See also *United States* v. *Keitel*, 211 U. S. 370.[1] For reasons to follow, we reverse.

We turn to the specific deficiencies alleged by appellee, noting first that the indictment tracks the language of § 1953 and thus makes it incumbent upon appellee to demonstrate that the additional allegations he claims to be necessary are required to fulfill the statutory purpose. We may dispose quickly of appellee's first contention. The language of § 1953 makes it applicable to "Whoever, except a common carrier . . ." engages in the forbidden conduct. The need to exempt common carriers makes it clear that Congress painted with a broad brush, and did not limit the applicability of § 1953 in the respects urged by appellee. In companion legislation where Congress wished to restrict the applicability of a provision to a given set of individuals, it did so with clear language.[2] A statute limited without a clear definition of the covered group, as would be the case with § 1953 under appellee's view of it, might raise serious constitutional problems. *Lanzetta* v. *New Jersey*, 306 U. S. 451. And the asserted restriction would defeat one of

[1] Thus the sufficiency of the indictment as a pleading is not at issue, *United States* v. *Gilliland*, 312 U. S. 86, nor are questions relating to the bill of particulars presently before us. See *United States* v. *Comyns*, 248 U. S. 349, 353. Of course on remand these questions will remain unaffected by anything decided today.

[2] Thus 18 U. S. C. § 1084 is limited to persons "being engaged in the business of betting or wagering."

the purposes of the section which is aimed not only at the paraphernalia of existing gambling activities but also at materials essential to the creation of such activities. As the legislative hearings made clear such materials are often legally fabricated and transported by persons engaged in legitimate businesses.[3] Since the purpose of Congress was to thwart the interstate movement of such paraphernalia the accomplishment of that goal required reaching "whoever" knowingly carried such materials in interstate commerce.[4]

Appellee's next contention, earnestly supported by the State of New Hampshire as *amicus*, is based on a similar reading of the legislative intent. Appellee emphasizes the congressional desire to attack organized crime, a purpose not served by restrictions on the distribution of New Hampshire Sweepstakes materials. Appellee argues that the specific exemption in § 1953 (b) of certain legal gambling enterprises from the provisions of § 1953 (a) and the limitation of § 1953 (a) itself to three types of gambling favored by organized crime reflect a congressional policy of respecting the individual gambling policies of the States and that these exemptions and limitations are merely indicative of that general policy. The New Hampshire Sweepstakes not being in existence when

[3] See Hearings on H. R. 468 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 261 (testimony of Mr. Stinson for American Totilisator Co.); Hearings on S. 1653 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pp. 20 (testimony of Mr. Jacobs for Jennings & Co.), 25 (testimony of Mr. Nelson for Bally Manufacturing Co.).

[4] See, *e. g.*, Hearings on H. R. 468, *supra*, note 3, at p. 26, where the Attorney General made clear that the primary purpose of the bill was to assist local enforcement of laws pertaining to gambling and like offenses; S. Rep. No. 589, 87th Cong., 1st Sess., p. 2, specified that the prohibition of the bill was "on the transportation of wagering paraphernalia" and would, without amendment, have comprehended the shipment of parimutuel equipment by legitimate business concerns.

§ 1953 was passed is necessarily exempted, so it is said, by policy rather than wording. The Government, on the other hand, contends that the specific exceptions point up the breadth of § 1953 (a) and the congressional desire to apply it except where Congress itself had carefully examined and approved exemption.

We find the Government's contention more in keeping with the language and purposes of the Act. Although at least one State had legalized gambling activities at the time the bill was passed, and the Congress was certainly aware of legal sweepstakes run by governments in other countries, Congress did not limit the coverage of the statute to "unlawful" or "illegal" activities. The sponsors of the bill made it clear that the measure as drafted was not so limited.[5] In passing 18 U. S. C. § 1084 and 18 U. S. C. § 1952 as companion provisions to § 1953 Congress exempted transmission of legal gambling information from the former and limited the latter to those engaged in "unlawful activity." Thus it is reasonable to assume that Congress would have given a specific indication of exemption for state-run wagering pools if it had desired to exempt them.

Exemption would also defeat one of the principal purposes of § 1953, aiding the States in the suppression of

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[5] During the Senate Hearings Assistant Attorney General Miller, representing the Department of Justice, was specifically asked whether the bill was intended only to apply to "illegal" activities under state law. He unequivocally replied: "No sir. That proviso is not in here. It was the position of the Department that these types of paraphernalia, records, and other devices should be barred from interstate commerce." Hearings on S. 1653, *supra*, note 3, p. 294. Before the House Committee studying the bill Mr. Miller was equally explicit. He noted that the Irish Sweepstakes would be covered by the bill and soon after declared that Congress might consider a special exemption for parimutuel materials since these arose in activities legal under state law. Hearings on H. R. 468, *supra*, note 3, p. 352.

gambling where such gambling is contrary to state policy. For example, New York prohibits the sale of lottery tickets and the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" that State regardless of the legality of the lottery in the place of drawing. N. Y. Const., Art. I, § 9, N. Y. Penal Law §§ 1373, 1382. To allow the paraphernalia of a lottery, state-operated or not, to flow freely into New York might significantly endanger that policy. It is clear that the lottery statutes apply to state-operated as well as illegal lotteries, and that § 1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in *France* v. *United States*, 164 U. S. 676, and *Francis* v. *United States*, 188 U. S. 375.[6] It would be anomalous to hold that where Congress meant to bar the lottery tickets themselves from interstate commerce it would allow the free circulation of other paraphernalia of the lottery.

Appellee's final contention raises a more troublesome problem under the Criminal Appeals Act under which this case is here. The indictment alleges the knowing interstate carriage of "records, papers and writings" and that these are "to be used, and adapted, devised and designed for use" in a forbidden activity. The Government contends that the question whether an acknowledgment can be, and was, so used is one of fact for the trial and not presently before this Court. In *United States* v. *Weisenfeld*, 376 U. S. 86, 91–92, the Court dealt with a defendant's claim that a statute was not applicable to him because of his peculiar situation by stating:

"Whatever the truth of this claim, it involves factual proof to be raised defensively at a trial on the merits.

[6] See H. R. Rep. No. 968, 87th Cong., 1st Sess., pp. 2–3; 107 Cong. Rec. 13962 (remarks of Senator Eastland).

> We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and reach of the statute as applied to such facts as may be developed by evidence adduced at trial."

Here, also, we might justifiably refuse to consider appellee's contention. However, the operation of the New Hampshire Sweepstakes, while a matter of fact, is not a disputed issue and a valid question is raised as to the construction of the use requirement in § 1953. Thus this case may be considered similar to *United States* v. *Hvass*, 355 U. S. 570, where in an appeal under the Criminal Appeals Act this Court determined the question whether a district court rule was a "law of the United States" for the purposes of the perjury statute. Thus we may inquire whether an acknowledgment of purchase can, after issuance, have a use in the New Hampshire Sweepstakes.

New Hampshire Sweepstakes tickets are sold by a special machine. The customer writes a name and address on each ticket and is not restricted to purchasing for himself.[7] The owner of a ticket may be an individual who has not come to New Hampshire to make the purchase. The completed ticket is held in storage in the machine and eventually used in the drawing. The acknowledgment, practically a carbon copy of the ticket, is ejected from the machine. It need not be retained to collect a prize since all prizes are paid directly to the person named on the ticket, and thus appellee claims it has no use in the sweepstakes. But common sense and ordinary experience negative such a formalistic conclusion. The acknowledgment serves a significant psychological purpose by receipting the purchase and assuring the owner that his ticket is properly registered. Before

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[7] New Hampshire Sweepstakes Commission, New Hampshire Sweepstakes Program 5–8.

this function is fulfilled by delivery of the acknowledgment to the owner of the ticket we think it perfectly appropriate to say that the acknowledgment is "to be used" in the sweepstakes.[8] The Government contends that it will prove that the acknowledgments specified in this indictment were in fact being delivered to out-of-state ticket owners who had not themselves purchased their tickets in New Hampshire but had done so through Fabrizio and were thus assured of the proper completion of their purchases. We think it sufficient to hold that such a state of facts is comprehended by this indictment and within the terms of 18 U. S. C. § 1953. The constitutional power of Congress to enact the statute as we have construed it is not questioned by appellee.

The judgment of the United States District Court for the Western District of New York is reversed and the case remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[8] See the colloquy between Assistant Attorney General Miller and Senators Keating and Kefauver reported at pp. 293–294 of Senate Hearings on S. 1653. There Mr. Miller distinguished between paraphernalia which had served and exhausted its use, *e. g.*, losing tickets on a horserace, and paraphernalia whose function was not yet exhausted.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1966.

United States, Appellant, v. Anthony L. Fabrizio. | On Appeal From the United States District Court for the Western District of New York.

[December 12, 1966.]

Mr. Justice Stewart, whom Mr. Justice Fortas joins, dissenting.

For me, the key issue in this case is whether the acknowledgments of purchase that the petitioner carried from New Hampshire to New York come within the prohibition by 18 U. S. C. § 1953 (a) of interstate carriage of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in . . . wagering pools with respect to a sporting event . . . ." In the operation of New Hampshire's sweepstakes, tickets are sold through special machines, and are retained by the machines after the purchaser fills in a form provided for his name and address. After the tickets are drawn, winners are notified by telegram. The machines also provide the purchaser with an acknowledgement of purchase, which is merely a record of the purchase transaction. In order to be eligible for and to receive a prize, the purchaser of a ticket need not retain or present this purchase acknowledgement.

The Government does not contend that federal law makes it a crime for a person from another State to visit New Hampshire, purchase a sweepstakes ticket there, and return to his home. But it has argued that if a visitor to New Hampshire returns home with a receipt that merely acknowledges his personal purchase and in no

way affects his eligibility to receive a prize, he has committed a crime punishable by imprisonment of up to five years.[1] Thus the Government requires us to assume that Congress has branded as felons many or most of the thousands of visitors to New Hampshire who have purchased sweepstakes tickets there. I do not believe that Congress intended such an unexpected result, which only the most abjectly literal approach to statutory interpretation could tolerate. No plausible legislative purpose would be served by the Government's construction, for when an individual takes an acknowledgement of purchase home from New Hampshire, merely retaining it as a personal record of his purchase, the anti-gambling policies of other States are in no way undermined, and no opening is provided for the growth of organized racketeering.

The Court apparently shares my concern with the overbroad reach of some of the Government's contentions. For the Court's opinion stresses that the Government has informed this Court that in its proof at trial it expects to show that the petitioner carried acknowledgements of purchase to New York, not to retain them as personal records of his own purchases, but to deliver them to other people in New York on whose behalf the petitioner purchased tickets in New Hampshire. The Court concludes: "We think it sufficient to hold that such a state of facts is comprehended by this indictment and within the terms of 18 U. S. C. § 1953." *Supra,* at p. —. I agree that if the petitioner had been charged with conducting an interstate scheme for sale of sweepstakes tickets and the proof substantiated the charge, he could be validly convicted under § 1953. In such a case, the acknowledgements of purchase would be "used, or

[1] 18 U. S. C. § 1953 (a) provides that those who are convicted of a violation of the section "shall be fined not more than $10,000 or imprisoned for not more than five years or both."

adapted . . . for use in . . . wagering pools with respect to a sporting event . . ." because they would serve the essential role of providing the ultimate purchasers with a claim against the agent who had purchased tickets in New Hampshire on their behalf. The operation of such a scheme would have the effect of extending sweepstakes sales across state lines, would undermine the anti-gambling policies of other States, and might provide fertile opportunities for racketeers.[2]

However, I must emphatically disagree with the Court's conclusion that "such a state of facts is comprehended by this indictment . . . ." The indictment merely charged the petitioner with interstate transport of "acknowledgements of purchase for a sweepstakes race of the State of New Hampshire" and recited the language of § 1953.[3] The Government also furnished a bill of

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[2] New Hampshire has enacted legislation, N. H. Rev. Stat. Ann. § 284:21–*o*, designed to deter those who seek to profit from such a scheme:

"Purchase of Tickets for a Fee Prohibited. No person shall engage in the business of purchasing or offering to purchase a sweepstakes ticket or tickets for, in behalf of, or in the name of another for a fee or service charge which shall make the ultimate cost of such ticket or tickets to the registered owner thereof greater than the legal price of such ticket or tickets as established by the sweepstakes commission under the authority of this subdivision. Whoever violates the provisions of this section shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

[3] The indictment recites, in full: "The Grand Jury charges: That on or about the 24th day of August, 1964, ANTHONY L. FABRIZIO, knowingly did carry in interstate commerce from Keene, State of New Hampshire, to Elmira, State of New York, in the Western District of New York, records, papers, and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U. S. C."

particulars that, insofar as relevant, simply reiterated the bare charge that the petitioner had carried acknowledgements of purchase across state lines.[4] These charges were consonant with the Government's broad theory that all interstate carriage of acknowledgements of purchase is prohibited, even if the acknowledgement is retained solely as a personal record of the carrier's own purchase. That interpretation of the statute, along with the indictment that embodied it, was properly rejected by the trial court.

As the Court appears to concede, although the language of its opinion is not altogether clear, the petitioner could be validly convicted only if he were shown to have participated in an interstate scheme for selling sweepstakes chances to persons outside New Hampshire. But no hint that the petitioner was being charged with such activities appears in the indictment or bill of particulars. The charges here fell far short of the established requirement that an indictment must specify the elements of the offense intended to be charged and apprise the defendant of the case that he must be prepared to meet. See *Russell* v. *United States*, 369 U. S. 749, 760–772, and the cases discussed therein. And the Government is not entitled to enlarge the indictment now by revamping the whole theory of the prosecution and making new and additional charges against the petitioner for the first time in the course of proceedings before this Court. This Court cannot remedy the deficiencies in the indict-

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[4] In response to the petitioner's contention that the indictment failed to state an offense, the Government's bill of particulars stated: "It is claimed by the United States that defendant knowingly carried in interstate commerce in violation of § 1953, T. 18, United States Code, 75 written acknowledgements of purchase of State of New Hampshire First Sweepstakes Race of September, 1964."

ment by retroactively reading the Government's new charges into it.

We long ago rejected the notion that "it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes . . . ." *Ex parte Bain*, 121 U. S. 1, 10. See *Stirone* v. *United States*, 361 U. S. 212; *Russell* v. *United States*, 369 U. S. 749, 770–771. As the Court in *Bain* observed, "Any other doctrine would place the rights of the citizen . . . at the mercy or control of the court or prosecuting attorney . . . ." 121 U. S., at 13. The Court's opinion today ignores these established principles, and allows the petitioner to be tried for a crime that he was not charged with committing.

For these reasons, I respectfully dissent.